The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1987

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To the Honorable Senate and House of Representatives:

I have the honor to transmit herewith the Report of the Department of the Attorney General for the year ending June 30, 1987.

Respectfully submitted,

JAMES M. SHANNON
Attorney General

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
JUNE 30, 1987

Account	*Account Name*	*Appropriation*	*Expenditures*	*Advance*	*Encumbrances*	*Balance*
0810-0000	Administration	$13,002,045.27	$11,837,540.04	—	$31,174.20	$1,133,331.03
0810-0014	Public Utilities Auth. by CH. 1221 1973	500,000.00	470,888.57	—	5,625.35	23,486.08
0810-0015	Seabrook Litigation Adm. & Exp.	420,773.00	—	—	—	420,773.00
0810-0017	Judicial Proceedings, relevant to Fuel Charge	64,882.11	64,877.79	—	—	4.32
0810-0021	Medicaid Fraud Control Unit	1,614,227.00	1,409,942.05	—	17,684.85	186,600.10
0810-0031	Local Consumer Aid Fund	730,551.00	715,884.55	—	4,106.00	10,560.45
0810-0032	Local Consumer Aid Fund Deposit	108,965.66	94,458.13	—	—	14,507.53
0810-0035	Antitrust Div. Adm.	450,193.00	419,506.79	—	—	30,686.21
0810-0201	Insurance Auth. by Ch 266, 1976	400,000.00	383,838.61	—	—	16,161.39
0810-0410	Forfeited Funds	308,512.96	83,801.00	—	—	224,711.96
0810-1031	Victim/Witness Discretionary Allocation of 0840-0105	43,585.00	25,994.89	—	—	17,590.11
0810-1032	Victim/Witness Discretionary Allocation of 0840-0105	52,312.00	20,696.76	—	83.45	31,531.79
	TOTALS	$17,696,047.00	$15,527,429.18	—	$58,673.85	$2,109,943.97
Schedule 2	TOTALS	$ 156,837.92	$ 59,573.92	—	—	$ 97,264.00
	GRAND TOTALS	$17,852,884.92	$15,587,003.10	—	$58,673.85	$2,207,207.97

DEPARTMENT OF THE ATTORNEY GENERAL
GRANTS AND TRUSTS
RECEIPTS AND DISBURSEMENTS
JULY 1, 1986 to JUNE 30, 1987

	Account Number	*Balance July 1, 1988*	*Receipts*	*Disbursements*	*Balance June 30, 1987*
Attorney General Trust Fund	0810-6614	$126,112.18	—	$59,575.00	$66,537.18
Water Pollution Control Program	0810-6630	—	$ 4,640.81	4,639.73	1.08
Air Pollution Control Program	0810-6631	24.10	—	—	24.10
Anti-Trust Enforcement Program					
New England Bid Monitoring Project	0810-6643	152.17	—	—	152.17
Hazardous Waste Enforcement	0810-6647	—	9,385.53	9,385.53	.00
Coastal Zone Management Program Implementation	0810-6661	2,693.47	—	—	2,693.47
Pesticide Regulation Program Enforcement Activities	0810-6662	27,856.00	—	—	27,856.00
TOTALS		$156,837.92	$14,026.34	$73,600.26	$97,264.00

DEPARTMENT OF THE ATTORNEY GENERAL
SUSPENSE FUNDS
RECEIPTS AND DISBURSEMENTS
JULY 1, 1986 to JUNE 30, 1987

Name	*Account Number*	*Balance July 1, 1986*	*Receipts*	*Disbursements*	*Balance June 30, 1987*
Thomas C. McMahon v. Nyanza	0810-6732	$ 3,679.42	—	—	$ 3,679.42
J.T. Geanese d/b/a King B Auto	0810-6774	10,500.00	—	—	10,500.00
Chrysler Corp.	0810-6784	10,000.00	—	—	10,000.00
Patrick Ciampo & Howard Johnson a/k/a Edward Miller	0810-6793	7,106.25	—	—	7,106.25
Robert Wilcox d/b/a Roberts Auto	0810-6805	1,000.00	—	—	1,000.00
Wm. M. Johnson III & JG Salvage	0810-6808	2,646.84	—	—	2,646.84
Steven Sesser Construction Co. Wonder Construction Co.	0810-6811	380.00	—	—	380.00
Paul Solas, T. William Solas d/b/a Center Rehabilitation	0810-6813	1,817.71	—	—	1,817.71
Allen C. Keene, et al	0810-6819	2,842.63	—	—	2,842.63
Fiore Depot Motors, Inc.	0810-6829	12,700.00	—	—	12,700.00
Janet Strom Enterprises, et al	0810-6836	487.00	—	—	487.00
Bennett St. Auto Sales, Inc.	0810-6841	4,996.46	—	—	4,996.46
Dean St. Auto Sales, Inc. & Kenneth Troiani	0810-6842	8,547.79	—	—	8,547.79
Stephen Hamparian d/b/a Comm. Tow & Repair	0810-6843	1,261.00	—	—	1,261.00
Majestic Auto Buyers, Inc.	0810-6850	19,500.00	—	—	19,500.00
Olympia Auto Sales	0810-6857	20,000.00	—	$ 8,569.50	11,430.50
Festino Fuel, Inc. Joseph & Vicent Festino	0810-6859	1,000.00	—	—	1,000.00
H.J. Wassar Co., Inc.	0810-6861	149.00	—	—	149.00
Century Auto Appraisers, Inc. RP Stone & Peter Slate	0810-6862	2,000.00	—	—	2,000.00
Boston Bullion Ltd., et al.	0810-6864	2,400.00	—	—	2,400.00
Porter Chevrolet	0810-6866	2,245.05	—	—	2,245.05
American Income Life	0810-6876	5,604.94	—	148.92	5,456.02
Pampalone Music School, Inc., v. Pampalone	0810-6877	46.50	—	—	46.50
Leonidas & Ralph Benzan d/b/a Tropicana Oil Co.	0810-6878	1,000.00	—	—	1,000.00
Richard O'Riley d/b/a O'Riley Auto & Rosco Auto Parts, Inc.	0810-6880	17,000.00	—	9,500.75	7,499.25
Maria Monge d/b/a J&R Auto Repair & Used Cars	0810-6881	31,500.00	—	12,000.00	19,500.00
Feel Fit Health Center Ltd. & Edward P. Matter	0810-6882	270.44	—	—	270.44
G.A. Mulloy, Inc. d/b/a Car Wholesaler	0810-6883	.48	—	—	.48
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Yurboc Ins. Rest. Acct	0810-6894	4,500.00	[illegible]	4,499.37	[illegible]
Venom Auto Sales, Inc., et al	0810-6896	78,232.98	10,000.00	83,454.65	4,778.30

[illegible]	0810-6894	4,500.00	—	4,499.37	.63
Vurhoc Ins. Rest. Acct	0810-6896	78,232.95	10,000.00	83,454.65	4,778.30
Yenom Auto Sales, Inc., et al.	0810-6898	9,000.00	—	—	9,000.00
Leo Hamel	0810-6900	3,975.20	—	3,975.20	.00
Marshall Pontiac-Nissan	0810-6901	271.77	2,000.00	2,271.77	.00
Aetna Finance d/b/a Itt Thorp Co.	0810-6902	—	8,455.10	7,203.70	1,251.40
Leland Powers School Settlement	0810-6904	42,000.00	—	41,994.21	5.79
Andrews Paint Co., FG Andrews	0810-6905	200.00	300.00	—	500.00
Cabot Mtg. Corp.	0810-6906	176.25	30,000.00	29,800.50	375.75
Alex O'Neil	0810-6908	700.00	—	450.00	250.00
Peanut Corp.	0810-6909	900.00	7,100.00	8,000.00	.00
Theodore Nader d/b/a Nadar Auto	0810-6910	2,500.00	—	—	2,500.00
Falmouth Auto	0810-6911	—	2,000.00	1,999.98	.02
Robertson & Gray, Inc.	0810-6913	—	12,000.00	9,999.99	2,000.01
Hodgen Rest Homes	0810-6914	—	18,916.99	—	18,916.99
North Shore Roommates Service	0810-6915	—	1,088.39	—	1,088.39
City of Quincy	0810-6916	—	5,956.53	5,956.53	.00
Diamond Chevrolet	0810-6917	—	11,496.00	4,100.00	7,396.00
Charlie Construction	0810-6918	—	8,500.00	7,608.62	891.38
Rusty Jones, Inc.	0810-6919	—	2,263.00	—	2,263.00
FIC Assoc./Carter Green Condos.	0810-6920	—	19,455.03	—	19,455.03
Business Education	0810-6921	—	116,298.81	—	116,298.81
O'Henry's Used Cars	0810-6922	—	10,100.00	—	10,100.00
Forest Mtg. Group	0810-6923	—	15,000.00	—	15,000.00
Mall Auto Sales	0810-6924	—	15,000.00	—	15,000.00
Economy Auto Sales	0810-6925	—	9,036.60	1,900.00	7,136.60
Assumption Mutual Life	0810-6926	—	189,924.84	189,924.84	.00
Wilmington Sales & Lowell Ford	0810-6927	—	180,000.00	—	180,000.00
Equitable Life Ins. Co.	0810-6928	—	86,158.00	86,158.00	.00
Home Mtg. Corp.	0810-6929	—	235,000.00	64,433.43	170,566.57
Womens World Health Spa	0810-6930	—	20,000.00	—	20,000.00
Casey Chevrolet	0810-6931	—	23,000.00	18,000.00	5,000.00
Charlesbank Dry Cleaning	0810-6932	—	900.00	—	900.00
Village Truck	0810-6934	—	4,286.60	1,286.60	3,000.00
Fitness Dynamics	0810-6935	—	1,034.00	—	1,034.00
Second Chance Cars	0810-6936	—	1,627.00	1,127.00	500.00
T.C. Sweeney	0810-6937	—	1,000.00	—	1,000.00
Dura Bulb Lighting Prod	0810-6938	—	1,997.22	—	1,997.22
TOTALS		365,683.48	1,053,169.11	608,743.56	810,109.03

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF INCOME
For Fiscal Year Ended
June 30, 1987

Account Number		
0801-40-01-40	Fees, Filing Reports, Charitable Organizations	$ 231,510.00
0810-40-02-40	Fees, Registrations, Charitable Organizations	34,460.00
0810-40-03-40	Fees, Professional Fund Raising Council	.00
0801-41-02-40	Fines & Penalties, Civil Actions	697,726.06
0801-62-02-40	Reimbursement for Services, Cost of Investigations	311,154.96
0801-62-03-36	Local Consumer Aid Fund - Reimburse for Service	51,759.85
0801-65-09-36	Fuel Assessment	64,882.11
0801-67-67-40	Reimbursement, Indirect Cost Allowances	421,606.00
0801-67-01-40	Reimbursement, for Service	1,077,628.00
0801-68-04-36	Forfeitures	13,046.00
0801-69-99-40	Miscellaneous	1,122,100.21
	TOTAL INCOME	$4,025,873.19

COMMONWEALTH OF MASSACHUSETTS

In accordance with the provisions of Section 11 of Chapter 12 and of Section 32 of Chapter 30 of the General Laws, I hereby submit the Annual Report for the Department of the Attorney General. This annual report covers the period from July 1, 1986 to June 30, 1987 and is the first report I have filed as the Attorney General of the Commonwealth of Massachusetts.

Fiscal 1987 not only marked the beginning of my first term in this office, but also marked the end of a distinguished 12 year term by my predecessor, Attorney General Francis X. Bellotti. Attorney General Bellotti, throughout his tenure, displayed a strong sense of commitment to working with others in the public interest and advancing the cause of truth and justice in the Commonwealth. I wish him luck in his future endeavors.

These first six months have been a period of transition and reorganization. Together with Attorney General Bellotti, I have strived to make this transition one that ensures that the public's business be carried on with professionalism and attention to detail. A search and review process was undertaken to assemble the most talented and qualified staff for this office with the help of a group of experts, including law deans and professors, leading members of the bar, leading representatives of business and labor, and professional advisors in important areas of the law and law office management.

As I quoted Emerson in my inauguration speech, government should be the "vehicle of hope" in the lives of all our citizens. Over the next few years, there shall be no more important task for all of us in this office than to maintain that trust between the people and their government. Our goal is to strengthen the confidence of people in their government, to expand opportunities for our citizens, and to enforce the law fairly.

The people who need these laws enforced the most are those who fare worst when government looks the other way: the poor, the frail, the disadvantaged. My aim is to be their advocate, to enforce our laws so that the legal system works—not just for the powerful, but for all of us.

This introduction cannot begin to detail the important work that this office has begun to do—each of the bureaus handled hundreds of cases during the fiscal year. A description of their activities is in this report.

CIVIL BUREAU

INDUSTRIAL ACCIDENT DIVISION

The Industrial Accident Division serves as legal counsel to the Commonwealth in all workers' compensation cases involving state employees. Pursuant to G.L. c. 152 §69A, the Attorney General must approve all payments of benefits and disbursements for related medical and hospital expenses in compensation cases. In contested cases the division represents the Commonwealth before the Department of Industrial Accidents and in appellate matters before the Appeals Court and the Supreme Judicial Court.

There were 16,130 First Reports of Injury filed during fiscal year 1987 for state employees with the division of Industrial Accidents, an increase of 3,002 over fiscal year 1986. Of the lost time disability cases, the division reviewed and approved 3,067 new claims for compensation and 222 claims for resumption of compensation. In addition, the division worked on and disposed of 165 claims by way of lump sum agreements, and 9 by payment without prejudice.

The division appeared for the Commonwealth on *1,437 formal assignments before the Department of Industrial Accidents*. The division also appeared before the Superior Court concerning enforcement of orders pursuant to G.L. c. 152 §12(1) and before the Appeals Court on appeals from decisions of Industrial Accident Review Board pursuant to G.L. c. 152 §12(2). In addition to evaluating new cases, the division continually reviews the accepted cases to bring the medical reports up to date and to determine present eligibility for compensation.

Total disbursements by the Commonwealth for state employee's Industrial Accidents claims, including accepted cases, Board and Court decisions and lump sum settlements, between July 1, 1986 to June 30, 1987 follow:

General Appropriation
to Division of Industrial Accidents

Incapacity Compensation	$20,000,090.00
Medical Payments	5,802,970.00
TOTAL DISBURSEMENT	$25,803,060.00

This division is also responsible for defending the Second Injury Fund set up by Chapter 152, §65 against claims for reimbursement made under Chapter 152, §37 and 37A. The Second Injury Fund encourages employment of the handicapped by relieving the insurer from the burden of paying the entire compensation for further disability of the employee due to the combined effect of his previous injury and one later received in the course of employment.

Pursuant to G.L. c. 33, §§13-11A, *the Chief of the Industrial Accident Division represents the Attorney General as a sitting member on the Civil Defense Claims Board*. The Claims Board reviews and processes claims for compensation of unpaid civil volunteers who were injured while in the course of their volunteer duties.

The division also *represents the Industrial Accident Rehabilitation Board*. When an insurer refuses to pay for rehabilitative training for an injured employee, the division represents the case to the Industrial Accident Board on behalf of the Industrial Accident Rehabilitation Board.

CONTRACTS

The responsibilities of the Contracts Division generally fall into three areas: litigation involving matters in a contractual setting; advise and counsel to state agencies concerning contractual matters; and contract review.

The Contracts Division *represents the Commonwealth, its officers, and agencies, as both party plaintiff and defendant in all civil actions involving contract and contract related disputes.*

Most cases handled by the division concern public building, state highway, and public work construction disputes. Other typical cases involve claims arising from the interpretation of leases, employment contracts, statutes, rules, regulations, and surety bonds.

In contract actions against the Commonwealth, G.L. c. 258, s.12, is the controlling statute and the Attorney General represents the Commonwealth in Superior Court in all such disputes.

At the commencement of contract actions, including bid protests, litigants often seek temporary restraining orders and preliminary injunctions against the Commonwealth, its agencies, and officers. The granting of such relief would delay the execution of contracts, increase contract cost to the public and result in additional claims for damages. During the fiscal year, division attorneys successfully resisted all such attempts for injunctive relief.

Government contract disputes are complex litigation involving multiple parties including architects, consulting engineers, subcontractors, suppliers, and surety companies. The discovery stage often involves the retrieval of massive numbers of documents which must then be reviewed and analyzed. Trials of public contract actions also involve lengthy hearings before the Court or before Court appointed masters. As a result, the Contracts Division has begun to consider alternatives in resolving disputes which could provide simplified and expedited substitutes for formal litigation. Such alternatives could better protect state agencies, save taxpayer dollars and provide prompt and fair resolution of dispute for those doing business with the Commonwealth.

The Attorney General also institutes affirmative litigation to recover money due to the Commonwealth due to contract breaches. Fifty-two new actions were commenced during FY 1987 and 36 cases were closed. As of June 30, 1987, there were 203 pending cases in the Division representing a total dollar exposure to Massachusetts of $75,582,520.

On a daily basis, the Division *receives requests for legal assistance from state agencies and officials.* Problems involve formation of contracts, performance of contracts, bidding procedures, bid protests, contract interpretation, and many other miscellaneous matters. The most frequent request dealt with indemnification clauses in leases and arbitration provisions in construction contracts.

On a weekly basis, the Contracts Division also receives requests for assistance in purchasing. Division members counsel the Purchasing Agent and his staff, interpret regulations, and attend informal protest hearings.

The division has a similar relationship with respect to the Department of Public Works, Metropolitan District Commission, Executive Office of Transportation and Construction, Board of Regents of Higher Education, the Departments of Mental Health, Mental Retardation, Youth Services, Environmental Management,

Water Resources, and Public Welfare, State Lottery Commission, and Division of Capital Planning and Operations.

The division *reviews many state contracts, leases, and bonds submitted by state agencies.* All contracts are logged in and out, and a detailed statue record is maintained. The average contract is approved within 48 hours of its submission to the division.

During the fiscal year, the Division received 581 contracts for approval as to form. Forty-two contracts were rejected and later approved once the deficiencies were corrected.

EMINENT DOMAIN

The Eminent Domain Division *represents the Commonwealth in the defense of petitions for the assessment of damages resulting from land acquisition by eminent domain.* The Commonwealth acquires land for a variety of purposes, including rights of way for roads, land for state colleges, land for recreation and park purposes, land for flood control and land for easements. The division deals primarily with the Department of Public Works, the Metropolitan District Commission, the Department of Environmental Affairs, state colleges, the University of Massachusetts, the Armory Commission, the Department of Food and Agriculture, the Department of Fisheries & Wildlife and Environmental Law Enforcement and the Department of Capitol Planning and Operation.

The division also *provides legal assistance to the Real Estate Review Board* in settling damage claims on takings of government-owned land for highway purposes. Additionally, the division is sometimes asked to testify before the Governor's Council prior to their approving payment of land damage cases settled by the Department of the Attorney General.

Informal advisory services on eminent domain questions are rendered to practically every state agency, and the many cities and towns.

Chapter 79 of the General Laws prescribes the procedure in eminent domain proceedings. Under Chapter 79, when property is taken, the taking agency makes an offer of settlement known as a pro tanto, which makes available to the owners an amount the taking agency feels is fair but reasonable but reserves to the prior owners the right to proceed, through the courts, to recover more money. In the event of a finding by the court or jury, the pro tanto payment is subtracted from the verdict and the taking agency pays the balance with 10% interest from the date of the taking to the date of the judgment.

If occupied buildings are situated on parcels acquired by eminent domain, the occupants remaining become tenants of the Commonwealth and are obligated to pay rent. Rent collection is handled by a Special Assistant Attorney General who is assigned fulltime to the Department of Public Works (DPW). While reporting directly to the agency, the Special Assistant Attorney General's performance is reviewed by the Eminent Domain Division.

His primary responsibility is representing DPW in all maters related to state-owned property being leased or rented to the general public. This includes negotiating settlements, closing out uncollectibles, filing suits to enforce the rent payment, as well as eviction. In those cases where rent is owed to the Com-

monwealth and there is a land damage case pending, the Eminent Domain Division trial attorney handles both matters at the time of trial.

During the past fiscal year, 50 rent cases were closed out and $198,239 was collected and turned over to the State Treasurer. During FY 1987, about 80 land damage cases were disposed of, the majority by trial before juries in Superior Courts throughout the Commonwealth. The disposition of these cases resulted in a savings to the Commonwealth of approximately $10 million. In addition, more than 275 cases were disposed of in the Land Court as well.

The Eminent Domain Division also has the responsibility of *protecting the Commonwealth's interests in all petitions for registration of land filed in the Land Court.* In each case, a determination is made whether or not the Commonwealth, or any of its agencies, has an interest which may be affected by the petition. If such a determination is made, the division is given a full hearing before a full decree is issued. Some issues are tried to a conclusion while others are amicably agreed upon with the rights of the Commonwealth protected by stipulation.

Land Court matters involve the full-time activities of an Assistant Attorney General. The court's jurisdiction covers every type of land transaction from foreclosure and tax takings to determination of title absolute as well as all the equity rights arising from their determination.

The Eminent Domain Division is *involved in almost every petition to confirm or register title.* The involvement requires the determination of all interests in state highways, the preservation of the taking lines, the determination of drainage and other easements and the assurance that the decree is entered with the proper stipulations.

Land Court also determines so-called ''water rights''. This is becoming a new problem area because many rivers and streams have been cleaned and improved through federally-funded projects, bringing into question the Commonwealth's rights and responsibilities. Additionally, the tidal areas of the Commonwealth are creating continual litigation, particularly where the Colonial Ordinances are concerned. Litigation is developing whereby the public is asserting possession and prescriptive rights in the tideland flats and beach access.

The land registration process continues to involve diverse issues. Many railroad rights of way appear in registration cases. Many pose serious questions regarding abandonment and the effect upon the total railroad right of way. The Commonwealth, by way of the Secretary of Transportation, has acquired railroad rights of way for both passenger service and recreational uses. The reversionary rights and the effects upon Commonwealth title are important issues.

The Commonwealth has become involved in problems caused by filling and dredging along the shoreline and other areas developed by beach associations, especially on the Cape and Islands. When dredging involved placing material on the shore, private access rights to and from the beaches are altered.

All rental agreements, pro tanto releases, general releases, deeds of grants and conveyance, and documents relating to land under the control of any of the state's departments or agencies must be reviewed and approved as to form by the Eminent Domain Division.

The Division continues to assist the Department of Food and Agriculture in expediting and implementing the mandates of Chapter 780 of the Acts of 1977, known as the Agricultural Preservation Restriction Act. This act helps to preserve

the limited farm land remaining in Massachusetts by providing a method where the farmers receive compensation for the so-called "developmental rights" in their land without destroying the productive capacity and value of the farm land. Once development rights are sold, a deed is then filed in the appropriate county registry which restricts the land use in perpetuity to farming and agricultural uses. Since the program began in 1977, more than 20,000 acres of farmland have been permanently protected in Massachusetts.

TORTS

The Torts Division handles *primarily tort and civil rights suits brought against the Commonwealth and its employees, the investigation and preparation of reports for the district courts on Petitions for Compensation to Victims of Violent Crimes, Contributory Retirement Appeals Board (CRAB) cases and collection cases.*

Collections cases are handled by both Torts Division attorneys and by attorneys assigned to the Civil Bureau. CRAB cases are distributed among all Civil Bureau attorneys.

At the end of the fiscal year, the division had 970 open cases and was supervising 208 claims against the Commonwealth where the Attorney General acts as executive officer. There were 355 new cases, and 207 cases were closed.

During FY 1987, 78 cases were settled without trial. Dismissals or summary judgments on behalf of the Commonwealth were obtained in 110 cases. Of the 24 cases tried, 15 resulted in plaintiff's verdicts. Additionally, 806 petitions for compensation of victims of violent crime were opened and 539 were closed.

As in previous years, the unavailability of funds to settle claims prior to trial is still a major problem. When liability cases can be settled prior to trial there is generally a substantial saving for the Commonwealth.

CRIMINAL BUREAU

The Criminal Bureau was restructured into six Divisions: Public Integrity, Narcotics, Special Prosecutions, Division of Employment Security, Victim Compensation, and the Criminal Appellate Division.

During the 1987 fiscal year, the Bureau prosecuted a wide variety of cases developed by its own investigations division, as well as those referred by other government agencies or the district attorneys.

PUBLIC INTEGRITY

Fiscal Year 1987 saw the establishment of the Public Integrity Division under the new administration of Attorney General Shannon. Enforcement against crimes of public corruption became a priority in the new administration and prosecutors and investigators with experience in public corruption cases were recruited to lead the division.

The lawyers and investigators devote their time exclusively to public corruption cases. Division cases included: bribery and other violations of the

Massachusetts conflict of interest statute (M.G.L. c. 268A); fraud against government agencies in procurement and other matters; election law and campaign finance violations; and related larcenies, tax crimes, and other violations of the public trust by government officials and by those dealing with public agencies.

During FY 1987, several investigations were launched, and prosecutions were prepared although none of them became a matter of public record during the fiscal year.

NARCOTICS DIVISION

The Narcotics Division was formed in April 1987, with much of the first two months devoted to recruiting prospective staff.

The Attorney General and members of the Criminal Bureau hosted a series of morning breakfasts for police chiefs and police command staffs of virtually every law enforcement agency in the state. The meetings were designed to explain the goals and priorities of the Criminal Bureau, to offer assistance where possible, and to begin a dialogue which would contribute to joint investigations and future cooperation.

In addition, members of the Narcotics Division worked with representatives of the District Attorneys' Association on a variety of legislative matters, including redrafting the proposed RICO bill, a pen register bill, an immunity bill, and a narcotics proceeds forfeiture bill.

SPECIAL PROSECUTIONS

As part of the reorganization of the Bureau under Attorney General Shannon, the trial and investigative functions of the Criminal Bureau, which had been grouped within the Criminal Investigative Division (CID), were expanded through the establishment of the Narcotics and Public Integrity Divisions. The Criminal Investigations Division was renamed Special Prosecutions.

The priorities of the Special Prosecutions Division include: criminal enforcement under the Commonwealth's environmental laws; investigation and prosecution of tax violations; and major fraud cases including consumer and insurance frauds and larcenies by public employees and by attorneys and other fiduciaries.

In addition, Special Prosecutions continued the work of CID as the headquarters for general criminal investigation and prosecution within the Attorney General's office, most typically in violent crimes or general criminal cases referred to the Attorney General by District Attorneys because of possible conflicts of interest.

During FY 87, the Attorney General and the Commissioner of Revenue signed an agreement forming a *Tax Prosecution Unit* within the Criminal Bureau. Both agencies agreed to commit resources and staff to increase the number of prosecutions and investigations of tax cases. The agreement was signed on the eve of the tax filing deadline in April, 1987. During the fiscal year, criminal charges were brought by the Attorney General in 19 tax cases involving both individuals and corporate defendants who had willfully evaded or failed to comply with income, sales, and meals tax obligations.

Fiscal Year 1987 was the culmination of a joint *state-federal undercover investigation of fraudulent claims involving stolen cars*. It was known as *Operation "Go Fast."* In March, the Attorney General brought 111 indictments against 54 individuals in four counties (and the U.S. Attorney charged a like number) for concealing a motor vehicle to defraud an insurer, filing false police reports, and other charges relating to automobiles which were falsely reported as stolen by their owners. Working in coordination with the Governor's Auto Theft Strike Force, the Criminal Bureau oversaw a 13-month undercover investigation in which more than one hundred cars were "given up" by their owners, usually through middlemen, and then falsely reported as stolen to collect the insurance proceeds.

Other cases prosecuted by the division during FY 87 involved welfare fraud, state employee theft and embezzlement, narcotics (prior to the establishment of the Narcotics Division), commercial bribery, consumer fraud, and environmental crime.

EMPLOYMENT SECURITY

The Employment Security Division in the Criminal Bureau, provides the Division of Employment Security (DES) with the legal assistance and representation necessary to enforce the Massachusetts employment security laws. The division also handles appellate matters arising from decisions granting or denying unemployment compensation benefits to individual claimants.

The division prosecutes *employers who fail to comply with the Employment Security Law by not filing the necessary reports required by law or paying the taxes owed by law to the Division of Employment Security.*

The division makes every effort to fully inform employers of their rights and obligations under the law. As a result, some intransigent taxpayers, when faced with the prospect of criminal prosecution, decide to pay their taxes.

During the fiscal year, *1355 employer tax cases* were handled by the division. When the year began, *1296* cases were pending, and *59* additional cases were received. At the close of the fiscal year, *268* cases were closed, leaving a balance of *1087* employer tax cases pending.

Applications for criminal complaints were brought in the Boston Municipal Court, charging *138* individuals with *1641* counts of nonpayment of taxes, totaling *$2,689,471.35* owed to the Commonwealth by delinquent employers. The Boston Municipal Court issued complaints against *125* individuals for *1543* counts of nonpayment of taxes totaling *$2,374,613.01.* In addition, the division obtained *23* convictions on employer tax cases and the court found facts sufficient to warrant a finding of guilty in another *45* cases.

Overdue taxes totaling *$2,136,190.27* were collected during the fiscal year, and deposited in the Massachusetts Unemployment Compensation Fund.

The Division also prosecutes *individuals who collect unemployment benefits while gainfully employed and earning wages.* Criminal complaints are brought only when the facts surrounding the offense have been investigated and criminal intent substantiated. Complaints are filed in the jurisdiction where the claimant filed for benefits.

During the fiscal year, *866* fraudulent claims for unemployment benefits were handled by the division when the year began and *853* cases were pending and

13 more cases were filed. At the end of the year, *221* cases were closed, leaving a balance of *645* employer tax cases pending.

Applications for criminal complaints were brought in the various courts of the Commonwealth, charging *29* individuals with *514* counts of larceny totaling *$69,183.00* in unemployment insurance benefits fraudulently collected from the Commonwealth. The courts issued complaints against *29* individuals for *582* counts of larceny totaling *$69,388.* In addition, the division obtained *10* convictions on larceny cases and the court found facts sufficient to warrant a finding of guilty in an additional *13* cases.

Restitution totaling *$154,962.96* was collected from fraudulent claimants during the fiscal year and much has been restored to the Massachusetts Unemployment Compensation Fund.

The division also represents the Director of DES—in both cases brought against him and also on his behalf. During the Fiscal Year, the division represented the DES Director in *28* cases.

The division also handled 16 *appellate cases arising from decisions granted or denied unemployment compensation benefits to individual claimants*—in the Supreme Judicial Court or the Appeals Court of the Commonwealth. Seven cases were pending when the year began and nine more were filed. Ten of the cases were argued and closed. Of those, the court upheld the position of the Director's attorney in two cases, denied the position of the Director's attorney in three cases, remanded four cases for further review by the State Agency, and dismissed one case ordering it to be docketed in the District Court.

CRIMINAL APPELLATE

Cases handled by the Criminal Appellate Division primarily involve the *defense of state correctional authorities.* The division handled more than 250 new cases, and more than 100 prisoner suits were referred to the Department of Correction for representation. The inmate suits challenged conditions of incarceration, procedures surrounding disciplinary hearings, and various prison regulations.

The division also defended more than 30 federal *habeas corpus* petitions challenging the constitutionality of state criminal court convictions. The division continued to represent the Commonwealth in all cases involving annual review of inmates confined as sexually dangerous persons at the Treatment Center at Bridgewater. This year, 30 petitions were disposed of in Superior Court hearings.

The Division *successfully opposed three petitions for a writ of certiorari in the United States Supreme Court.* Five cases were argued in the First Circuit Court of Appeals. Two cases were argued in the Supreme Court, and five cases in the Appeals Court of Massachusetts.

The division also *processed the rendition of fugitives from justice.* Demands from both law enforcement officials of the Commonwealth and Governors of other states were examined, and 231 opinions were rendered on the legality of each demand in FY 1987.

MEDICAID FRAUD CONTROL UNIT

During Fiscal Year 1987, the Medicaid Fraud Control Unit (MFCU) was in the forefront of the growing national focus on health care provider fraud and the need to protect elderly nursing home residents from physical and financial abuse.

As a certified Medicaid Fraud Control Unit, the unit prosecutes both institutional health care providers and ambulatory providers such as doctors, dentists, psychiatrists, laboratories, pharmacies and transportation companies. The unit has also successfully prosecuted instances of physical abuse to patients in long-term care facilities.

The unit opened 102 cases in fiscal year 1987. During the year, the unit initiated 12 prosecutions and obtained six convictions. As a result of these convictions, defendants paid $92,250 in fines, $87,338 in restitution, and $179,850 in costs and damages. An additional $357,001 in overpayments by the Medicaid Fraud Control Unit was recovered by the unit as were $10,857 in patient funds. The majority of MFCU prosecutions were initiated through the investigations of a special grand jury, specifically impaneled to investigate allegations of Medicaid fraud.

Several initiatives and cases completed during the Fiscal Year are worthy of note.

The MFCU has developed an innovative technique for *investigating dental service providers.* It involves an examination of Medicaid recipients by two dental consultants and the unit's staff dental hygenist. A photographic record is made of each recipient's mouth, and all recipients are interviewed. The unit concluded seven investigations of dentists during the fiscal year. One review revealed that the dentist had billed for fillings on teeth where there were no fillings. In some instances, recipients stated they had never even been to a particular dentist's office, even though that dentist submitted a bill.

This dentist was indicted for larceny and violation of the state's Medicaid False Claims Act. He pled guilty and received a one-year suspended sentence in the House of Correction, was fined $10,000, and was ordered to pay $15,000 in restitution, costs, and damages.

Another dentist received a one-year suspended sentence to the House of Correction, was fined $10,000 and ordered to pay restitution of $30,000.

In addition to these criminal convictions, the unit obtained $52,779 in civil recoveries during the reporting period from dental investigations.

In FY '87, the unit also entered civil settlements with three *clinical laboratories* resulting in payments of $205,487. These settlements were part of a continuing investigation into the clinical laboratory industry. This phase focused on economic arrangements designed to induce physicians to refer laboratory tests, including Medicaid, to a particular clinical laboratory. It included reviewing Medicaid billing by laboratories at a rate higher than the lowest price charged to any other purchaser.

By the end of FY '87, this series of investigations led to the recovery of nearly $1.5 million. In addition, a study by the Medicaid program projected annual savings of between $450,000 and $700,000 resulting from the unit's initiatives and related enforcement activities by the Welfare Department.

The unit concluded a case against a nursing home administrator who wrote checks payable to legitimate vendors and then deposited the checks in his own bank account, always using the same teller. Once this pattern was established,

the fraudulent items could be culled from legitimate vendor checks simply by searching for that teller's stamp. Both the individual and the corporation pled guilty. The individual received a sentence of five years in prison on charges of larceny and four counts of filing Medicaid False Claims. The corporation pled guilty to the same charges and was fined $56,000. The corporation and the individual defendant were held jointly liable for the payment of $39,337 in restitution.

In July 1986, the unit began an undercover operation designed to discover if nursing homes were soliciting cash payments from relatives of Medicaid patients as a precondition for the admission of Medicaid patients. Although none of the homes investigated requested such payments, it became clear that nursing homes' admission policies were discriminating against Medicaid recipients.

The unit shifted the focus of its investigation to determine the extent of discriminatory admissions. Based upon the evidence uncovered, the unit and the department's Consumer Protection Division filed consumer complaints against 10 nursing homes, one of which was part of a major national chain. In each case, the nursing home agreed to a consent judgment barring further discrimination. The homes also agreed to maintain a waiting list so that any future discrimination could be documented. The nursing home also paid $66,000 in fines, costs, and damages.

Nationally, the unit's investigations marks one of the few enforcement efforts aimed at addressing the pressing problem of provider discrimination against Medicaid recipients.

PUBLIC PROTECTION BUREAU

The Public Protection Bureau (PPB) consists of 11 divisions: complaints, local consumer programs, consumer protection, anti-trust, civil rights, environmental protection, insurance, public charities, utilities, nuclear safety, and special litigation.

The bureau brings affirmative litigation on behalf of the public and represents the public in insurance and utility rate hearings. The bureau also represents state agencies and boards that are involved in the public interest.

CONSUMER COMPLAINTS

During Fiscal Year 1987, the Complaint Section opened 5,088 consumer complaint cases, closed 4,038 cases, and assigned 3,781 cases to Complaint Section Personnel.

The section recovered $558,108.63 in refunds, savings and the value of goods or services for consumers—a reimbursement that would not have been possible without the intervention of the department.

In addition, 6,107 complaints were processed by the section: 1,716 were returned to consumers for lack of jurisdiction; 833 were referred to other state or local agencies; 1,049 were referred to other agencies in other states; and 2,509 were referred to local consumer programs.

The Information Line staff received 108,053 phone calls during fiscal year 1987. As a result of these calls, 12,152 citizens were sent Complaint/Inquiry Forms; 16,199 were given general information; and 79,714 were referred to local consumer programs or other state or federal agencies.

The staff also received 305 calls concerning civil rights issues. As a result of these calls, 143 citizens were sent Complaint/Inquiry forms, and 162 were given information relating to civil rights inquiries.

LOCAL CONSUMER PROGRAMS

The Local Consumer Service Unit is responsible for the administration of the Local Consumer Aid Fund and awards grants to a network of local consumer and face-to-face mediation programs. These community agencies assist citizens throughout the Commonwealth in the resolution of consumer problems. The local programs work in cooperation with the Department of the Attorney General and help identify repeat offenders of consumer laws.

Funding for the operation of these programs is allocated by the General Court to the Local Consumer Aid Fund (LCAF) (M.G.L. c. 12, s. 11G).

In FY 1987, a total of $691,137 was used for grants to 27 local consumer programs and eight face-to-face mediation programs. During fiscal 1987, $730,551 was appropriated by the Legislature to the Local Consumer Aid Fund. Ten percent, or $73,000, was retained for administrative purposes. An additional $44,000, earmarked for the LCAF in the settlement of consumer related cases, was used to supplement the Legislature's allocation.

In FY '87 there were *27 Local Consumer Programs* working in cooperation with the Attorney General's office. These local programs, usually found in community action programs or city halls, handled more that 16,000 consumer complaints. Through an informal process of telephone mediation, the community agencies were able to save consumers approximately $3.2 million.

Complaints typically involved automobile repairs and sales, home improvement transactions, landlord/tenant disputes and time-share issues. In addition to their mediation service, the programs also serve as a valuable source for general consumer information and advice.

In FY '87 there were seven full-time and one part-time *Face-to-Face Mediation Programs,* each operating with one paid staff person and 20 to 25 trained community volunteer mediators. Mediations involved landlord/tenant or consumer disputes. Referrals came from local consumer programs, small claims courts, landlord or tenant advocacy programs, and other community agencies.

The Face-to-Face Mediation Programs provided mediation services by assigning 250 trained citizen volunteers to 1,138 clients. A total of 455 face-to-face mediation sessions were held—82 percent resulted in written agreements, with 97 percent of those agreements upheld. In addition, 167 cases were resolved over the telephone by face-to-face staff.

CONSUMER PROTECTION

The Consumer Protection Division brings enforcement actions against businesses which use unfair and deceptive practices resulting in injury to consumers. Concentrating on cases where consumers cannot reasonably obtain relief through their own efforts, the division's caseload consists primarily of large-scale class actions brought on behalf of consumers affected in similar ways by the illegal activities of business.

The division's caseload generally addresses housing, health care, financial services, and automobiles.

In *Commonwealth v. Ronald Porter, et al.*, a final judgment was entered enjoining further unfair and deceptive practices by this landlord in his residential buildings throughout the state, including illegal evictions, violations of security deposit laws, use of illegal penalty clauses in leases, imposing unlawful waiver requirements on tenants, and unlawful entry into tenants' apartments. In addition to a permanent injunction against many of these practices, the judgment includes payments by the landlord to tenants whose leases had unlawful provisions or who overpaid for key and lock deposits. Porter also paid $2,000 to the Local Consumer Aid Fund, $8,750 in civil penalties, and $2,500 in attorneys' fees.

In *Commonwealth v. William W. Lilly, et al.*, the Commonwealth filed suit against Lilly and six other defendants for failure to comply with the provisions of Regulation 11 promulgated pursuant to the Boston Condominium Conversion Ordinance. The regulation requires a landlord converting units to condominiums to provide tenants with a binding purchase and sale agreement and includes a description of the "housing accomodation being sold as set forth in the Master Condominium Deed." The defendants also allegedly violated 940 C.M.R. 3.16(2) by failing to provide tenants, upon request, with information relating to condominium conversion which was material to their decision whether to purchase their units. The complaint asks the court to order injunctive relief and civil penalties, costs and attorneys' fees.

Suits were filed against 10 nursing homes alleging discrimination against elderly recipients of Medicaid in admission policies. The suits followed investigations by the Medicaid Fraud Control Unit. Consent Judgments were entered in all cases, enjoining the nursing homes from further discrimination against Medicaid recipients in their admission practices, requiring the homes to keep a chronological waiting list of applicants to ensure a non-discriminatory admission policy, and obtaining payment of costs, attorneys' fees and, in three cases, civil penalties. A total of $60,000 was paid to the Commonwealth.

During this period, another patient protector receivership was established and the operational aspects of another were successfully terminated. In *Bellotti et al. v. Avanti Health Care Incorporated d/b/a Regent Park Long Term Care Center,* a Stipulation in Lieu of Injunction required the defendant nursing licensee to immediately upgrade its substandard healthcare. When the defendant failed to do so, the division obtained the appointment of a receiver to operate Regent Park Nursing Home and protect its 120 elderly patients.

In *Shannon et al. v. Doctors Chronic Hospital of New Bedford d/b/a Francis P. Memorial Hospital et al.*, the division obtained a patient protector receiver to operate a 60-bed chronic hospital in New Bedford. The action followed the hospital's decertification as a Medicare provider by the U.S. Health Care Finance

Administration and the Commonwealth's Welfare Department. The decertification created a public health emergency because the facility lost all government funds to finance patient care. Money which the provider used to purchase food, medication and nursing care was expected to run out literally within hours.

In *Commonwealth v. Cambridge Diagnostics, Inc. et al.*, a consent judgment was entered against the company and its director, Laxman S. Desai. It required the defendant to make clear disclosures to consumers regarding the effectiveness of food allergy tests conducted by the laboratory, and to maintain adequate records.

In *Commonwealth v. Woman's World Health Spas of American, Inc. et al.*, the Commonwealth filed a final judgment by agreement, against Andre Yzaguirre, the president of Woman's World, and its franchisor, Raquel, Inc. The judgment prohibits Yzaguirre from engaging in unfair and deceptive acts in the sale and servicing of health spa memberships, and requires him to notify the Attorney General and post a bond if he resumes any type of business in Massachusetts which requires consumers to pay in advance for future services. Yzaguirre also paid $20,000 in restitution to consumers who filed complaints with this office.

In a major mortgage fraud case, *Commonwealth v. Home Mortgage Corporation, Inc.*, the division sued the corporation and its president, Mark J. Shaw, for representing to consumers that mortgage funds were available when neither sufficient funds nor firm commitments from investors were available. They also allegedly failed to discharge consumers' prior outstanding mortgage obligations when refinancing loans for consumers—leaving consumers with two outstanding mortgages. A preliminary injunction was obtained preventing the defendants from processing any new loans or commitments until they had fulfilled all existing loan obligations. More than 400 consumer complaints were filed in this case, 110 involving loans provided by the defendants that had to be sold to discharge prior encumbrances and loans. A consent judgment provided $235,000 in consumer restitution, penalties, fees and a permanent injunction.

In the *Matter of Chase Home Mortgage Corporation*, an Assurance of Discontinuance was filed against a New Jersey mortgage company doing business in Massachusetts. The settlement returned $1,000 to the Commonwealth for investigation costs. The company also agreed to discontinue the illegal practices and to rewrite mortgage loans with the original lock-in rate for consumers, who had their mortgages closed after May 1, 1986, at a higher interest rate than the original lock-in rate. In all cases, the closings were delayed through no fault of the consumer. The company also agreed to reimburse these consumers for overpaid interest.

In *Re: Home National Mortgage Corp., Lomas & Nettleton Co., Plymouth Savings Bank, and Westmark Mortgage Co.*, Assurances of Discontinuance were signed and filed in Suffolk Superior Court. We had received complaints against these companies for failing to honor lock-in rate commitments and for closing loans at rates and, in some cases, points which exceeded the consumer's original lock-in arrangement. The companies agreed to provide reimbursement of points, where appropriate, and to rewrite or refinance more than 200 loans. Each lender was required to rewrite or refinance *every* loan where the processing delays were not caused by the borrower, and to make explicit representations about the lock-in period. In addition, each lender paid between $1,000 and $1,500 in costs.

The First National Bank of Boston, which did not close any loans at the higher rate, signed a letter agreement which contained similar obligations to honor locked-in rate commitments and provide disclosures to consumers concerning locked-in mortgage rates.

In *Commonwealth v. Manhattan Financial Services, Inc.*, a consent judgment was entered which enjoined Manhattan Financial Services from brokering mortgages or advertising its services as a mortgage broker unless it is licensed as a real estate broker by the Board of Registration of Real Estate Brokers. Massachusetts law requires that any person or entity negotiating a loan secured by a mortgage or other encumbrance upon real estate be licensed as a real estate broker. Manhattan Financial Services had acted as a broker in many transactions when it did not hold a valid real estate broker's license. The company paid $5,000 in civil penalties.

In *Commonwealth v. Charles Mortgage Company, Inc.*, suit was filed against this New Bedford mortgage company/mortgage broker alleging that it had accepted application fees for refinancing and failed to produce refinancing agreements or to refund fees to some 15 complainants. The suit seeks an injunction against further mortgage lending activities by Joseph Boldiga, the company's primary operating agent, and restitution for the consumers.

The Division's renewed activity in the area of post-secondary education continued during the latter half of 1986 with the filing of a complaint against the *Business Education Institute, Inc.*, a post-secondary business school in Springfield. The allegations included admission of unqualified students, misrepresentations about services, and inadequate delivery of those services. After filing the complaint, the Commonwealth secured a preliminary injunction barring future misconduct. After learning of a possible transfer of assets by the proprietor of the school, the division quickly obtained an attachment of funds in excess of $100,000 for refunds to students who either did not receive services or otherwise were injured by the school's unfair practices.

In *Commonwealth v. AAMCO Transmissions, Inc.*, the department and 13 other states, filed a judgment barring the use of an "inspection service" marketing device under which AAMCO franchisees were forbidden to quote repair prices until a car's transmission was actually disassembled. The judgment, negotiated by a five-state team headed by Massachusetts, also provides for extensive internal monitoring by the AAMCO chain of its own franchises to prevent unnecessary and unauthorized repairs, delays and other consumer abuses. AAMCO paid the states $500,000 as part of the judgment, with Massachusetts receiving $75,000.

In *Commonwealth v. Seacrest-Cadillac-Pontiac-Mazda, Inc. d/b/a Seacrest Mazda,* a consent judgment was entered enjoining the defendant from failing to disclose leasing specifications if the defendant advertised that vehicles were available for lease; from failing to make five financing disclosures if certain "triggering terms" were used; and from making representations about financing. The defendant paid $5,000 in civil penalties.

Several final judgments were filed against dealers for alterating odometers. In *Commonwealth v. Felix Tranghese, d/b/a Mall Auto Sales and John Kowal,* one defendant agreed to a final judgment enjoining further odometer alterations, the monitoring of his business and the payment of $36,500 for restitution to consumers

and penalties. The defendant, a Western Massachusetts dealer, had spun the odometers of the vehicles he leased. Also, in *Commonwealth v. Robertson and Gray, Inc.*, a permanent injunction against odometer spins was entered and $12,000 was paid to the Commonwealth to be distributed as restitution to consumers.

ANTITRUST

During Fiscal Year 1987, the Antitrust Division continued its vigorous enforcement of state and federal antitrust laws. Highlights of the division's work during fiscal year 1987 follow.

In *Commonwealth of Massachusetts et al. v. Minolta,* Massachusetts joined 36 other states in simultaneously filing a complaint and settlement agreement against Minolta Corporation alleging a resale price maintenance scheme between Minolta and retailers selling the products. Under the terms of the settlement, the Commonwealth recovered more than $100,000 in restitution to consumers who purchased two popular brands of Minolta cameras.

The Antitrust Division obtained a settlement with Waldbaum, Inc. calling for the issuance of $2.5 million in coupons to consumers. In *Commonwealth of Massachusetts v. First National Supermarkets, et al.* the division brought price-fixing action against Waldbaum, Stop & Shop Companies, Inc. and First National Supermarkets, Inc. in 1985. The $2.5 million settlement was the largest ever secured by the Commonwealth in an antitrust action. Under the terms of the settlement, consumers were able to redeem $2 and $3 coupons on purchases of $20 or more at all Waldbaum Foodmart and any grocery store choosing to participate in the redemption program.

In *Commonwealth of Massachusetts v. Ashland-Warren, Inc.*, the Commonwealth and four bituminous concrete manufacturers reached a settlement of $385,000 in a 1982 bid rigging case filed by the Antitrust Division against 11 bituminous concrete manufacturers. The seven other defendants had previously settled with the Commonwealth. The defendants were charged with bidrigging and territorial allocations in selling bituminous concrete and road paving contracts to the Commonwealth and several cities and towns. Half of the settlement will go directly to the affected cities and towns, and the remainder to the state Antitrust Revolving Fund.

The Attorney General received a letter of assurance from *Hamilton Test System, Inc.*, a subsidiary of United Technologies, stating that it would no longer engage in a tying arrangement which required auto emissions test stations using Hamilton Auto Emission Analysis machinery to purchase calibration gas, paper and filters from Hamilton. The written Assurance of Discontinuance contained provisions requiring Hamilton to conduct educational programs for all service personnel to insure compliance and to provide notice of its non-restrictive policy to all customers.

The Commonwealth also reached a settlement with four major manufacturers of art supplies charged with engaging in a nationwide conspiracy to fix prices and rig bids. The proceeds of the settlement—approximately $85,000—were distributed to 303 school districts throughout the Commonwealth.

Final approval was given to a settlement among the Commonwealth, 49 other states, the federal government and all sections of the oil industry allowing the

states to recoup $4 billion in crude oil overcharges by major oil companies. During the 1970s, the major oil companies had violated crude oil price controls by charging customers prices above those allowed by federally mandated price controls. It is estimated that the Commonwealth could receive up to $100 million over the next three years as a result of this settlement, which will be used to fund energy related programs designed to benefit those who were injured by the crude oil overcharges. The Antitrust Division took a lead role on behalf of the states in this *Stripper Well* litigation.

The Attorney General filed objections with the Department of Transportation to the *Texas Air-Eastern Airlines merger.* The Attorney General asserted that the merger would substantially lessen airline competition at Logan Airport. In response to the competitive concerns raised by the Commonwealth, Texas Air sold Pan Am part of its shuttle operations between Boston and New York. The sale prevented the Texas Air-Eastern combination from monopolizing shuttle operations between Boston and New York.

CIVIL RIGHTS

The Civil Rights and Liberties Division enforces the Massachusetts Civil Rights Act which authorizes the Attorney General to seek injunctive relief when the exercise of legal rights is interfered with by threats, intimidation, or coercion. The division also represents state agencies in affirmative litigation, and brings cases in the public interest on a broad range of civil rights issues.

Major efforts include enforcing the Civil Rights Act in housing, education, public records, fair information practices, open meetings, and citizen complaints/community outreach.

In *Commonwealth v. Silva and Watson,* the division obtained an injunction against two white juveniles accused of verbally assaulting and macing an Hispanic male in South Boston. In *Commonwealth v. Prairrie, et al.* an injunction was obtained against four white adults charged with attacking black citizens in the Wainwright Park section of Dorchester. In *Commonwealth v. McCusker and Sevier* an injunction was obtained against two white adults for beating a white shop owner in Revere because of his close relationship with the Cambodian community. In *Commonwealth v. Curran, et al.,* injunctions were issued against one white juvenile and three white adults for a racially motivated attack on a Vietnamese Dorchester resident.

In *Commonwealth v. Guilfoyle, et al.,* injunctions were issued against three white juveniles for racially harassing and assaulting a white schoolteacher and black students in the Savin Hill area of Dorchester. In *Commonwealth v. Wahlberg,* the division obtained an injunction against a white adult who was part of a group of white males who assaulted two black restaurant workers in Dorchester. In *Commonwealth v. Horak* an injunction was issued against a white adult male accused of racial harassment and sexual assault of his Puerto Rican neighbors in a rooming house in Lawrence. In *Commonwealth v. Griffin, et al.,* an injunction was issued against three white adult defendants, including a father and his sons. The co-defendants were accused of breaking the windows of a Cambodian family in Chelsea with a baseball bat, making racial threats, and threatening and assaulting the white landlord of the Cambodian family who testified against one of the

co-defendants at his criminal trial.

The division filed an amicus brief in a criminal civil rights case involving an attack on a gay male. The Judge rendered a decision holding that an attack on a person because of sexual orientation constitutes an interference with personal privacy rights and rights of expression.

As the designee of the Attorney General, a member of the division continued to attend meetings of the Commonwealth's Records Conservation Board.

Several *Open Meeting Law* complaints filed with the division during fiscal year 1987 were resolved without litigation, and several others were referred to the District Attorneys.

In addition, a number of *Public Records Law* cases referred to the Attorney General from the Supervisor of Public Records were resolved informally. One case, involving the Carlisle Conservation Commission, was resolved formally when the Commission agreed to a written Assurance of Compliance in which it promised to treat as public records the handwritten notes made by its recording secretary at Commission meetings.

ENVIRONMENTAL

The Environmental Protection Division serves as litigation counsel on environmental issues for all state agencies, particularly those within the Executive Office of Environmental Affairs. The division handles all of the Commonwealth's civil litigation to enforce environmental protection programs established by state laws and regulations. The division brings suits to enforce the Commonwealth's regulatory programs governing air pollution, water pollution, wetlands, hazardous waste, hazardous materials, solid waste, water supply, "right-to-know," pesticides, waterways and billboards, and it defends decisions made by state agencies that administer environmental programs. In addition, based on the Attorney General's broad authority to protect the environment of the Commonwealth, the division initiates and intervenes in state and federal litigation, and participates in administrative hearings before federal agencies on significant environmental issues.

As a result of its enforcement efforts, the division receives substantial federal grant money from the Environmental Protection Agency.

This fiscal year the division recovered $911,900 in penalties and other payments. In addition, many cases have resulted in court judgments requiring private parties to undertake costly cleanups—a significant saving for the Commonwealth.

The division brought a lawsuit against *Clean Harbors of Kingston, Inc.*, for treating volumes of waste oil and water mixtures at its waste oil reclamation facility in excess of the limit set in the company's hazardous waste treatment license. A consent judgment required Clean Harbors to pay a civil penalty of $112,500 and to provide, without compensation, $100,000 worth of services to remove and properly dispose of hazardous waste from public high schools in the Commonwealth. The judgment also suspended the facility's license for six months, thereby upholding an administrative order previously issued by the Department of Environmental Quality Engineering (DEQE).

A consent judgment was entered in Suffolk Superior Court requiring *Three R Transportation, Inc.* to pay $90,000 in settlement of the Commonwealth's claims for civil penalties under the Massachusetts Hazardous Waste Management Act.

The case involved the company's transportation of hazardous waste without a license between 1980 and 1982. The payment was the largest ever recovered in Massachusetts for a hazardous waste transportation case.

The division filed suit against *ENSCO, Inc.*, an Arkansas-based hazardous waste transporter and disposal company, for transporting hazardous waste in the Commonwealth without a license. The complaint charged ENSCO with transporting a decommissioned electrical transformer containing polychlorinated biphenyls (PCB's) from the General Dynamics shipyard in Quincy, without a hazardous waste transporter's license. A consent judgment resolving the lawsuit required ENSCO to pay a civil penalty of $28,000 and to refrain from transporting any hazardous waste in Massachusetts without a license from DEQE. General Dynamics, also named as a defendant, was required to pay a civil penalty of $2,000.

A consent judgment was entered settling a suit against *Ledkote Galvanizing Co.* for mismanagement of hazardous wastes from its hot-dip zinc galvanizing operations. The judgment required Ledkote to pay a $35,000 civil penalty, to implement a hazardous waste management plan, to conduct tests for hazardous waste contamination of its property, and to undertake remedial action as necessary.

After a two-week trial, a jury in Bristol County returned verdicts against *The Ledge, Inc. and Cecil Smith,* its chief stockholder, holding both jointly and severally liable for the Commonwealth's costs of cleaning up hazardous waste at a Dartmouth site. The jury awarded $70,000 to the Commonwealth for the cost of cleaning up more than 1,000 barrels of hazardous waste stored illegally in a warehouse, and barrels and waste dumped into a pit behind the warehouse. The warehouse and dumpsite were located less than one-quarter mile from a town well which serves as a primary source of drinking water for residents. A separate judgment was entered earlier against another defendant, Harold Mathews, who had rented the warehouse from The Ledge, Inc.

The Attorney General and the Environmental Protection Agency negotiated a joint consent decree with five defendants, settling federal court litigation to obtain cleanup of hazardous creosote wastes at *Hocomonco Pond* in Westborough. The wastes had been generated by wood-treating operations conducted on the banks of the pond. Under the consent judgment, the defendant *Koppers Co.* agreed to accept responsibility for the hazardous material at the site and to conduct cleanup measures estimated to cost of $5 million. The four other defendants contributed cash payments toward the cleanup costs. The required measures included excavation of contaminated soils, dredging of contaminated sediments from Hocomonco Pond, and groundwater treatment. The contaminated soil and sediments were to be placed in a hazardous waste landfill constructed at the site. Koppers also agreed to operate, maintain, and monitor the site for 30 years.

In settlement of claims for reimbursement of hazardous waste cleanup costs, the division obtained $53,500 from the owners of the *Eastern Chemical Specialties* hazardous waste recycling and disposal facility in Worcester. The company had filed for bankruptcy in 1981. The division also initiated negotiations with 150 generators and transporters of chemical waste, seeking further reimbursement of government cleanup costs, implementation of a site assessment, and remedial work.

The division filed suit against the *City of Fitchburg,* seeking injunctive relief

to halt excessive discharges of pollutants from the city's wastewater treatment plant. The complaint alleged that the city's West Plant consistently exceeded the limitations of its water pollution permit for discharges into the Nashua River. The lawsuit was settled by a consent judgment filed in June 1987. The judgment required the city to repair the facility under a court-imposed schedule, at an estimated cost of $2 million.

The division filed suit against the *City of Marlborough* for violating the Clean Waters Act at its sewage treatment plant. Under a consent judgment, the town was required to build an advanced wastewater treatment facility, to develop a pre-treatment program, to meet interim effluent limitations, and to come into full compliance with the terms and conditions of its permit.

A suit against the *Town of Plymouth* charged the town with violating the Clean Waters Act at its sewage treatment plant. The court entered an interim consent order, requiring the town to take immediate preliminary measures to reduce the violations, including a strict moratorium on new sewer construction, a comprehensive "infiltration and inflow" program to remove illegal connections to the system, the rehabilitation of certain portions, and the implementation of a pre-treatment program to control industrial discharges.

The division asserted claims against the *Town of Provincetown* for violations of the Clean Waters Act and a previous consent judgment at its septage facility. An amended consent judgment was entered requiring improvement in handling the large volumes of septage generated during tourist season. It also required the town to make interim arrangements for disposing septage in excess of capacity, and to plan and construct a long-term wastewater treatment facility to replace the existing facility.

A final judgment was entered resolving a lawsuit against *Idle Wild Farm, Inc. (L. B. Darling Division)* for operating a wastewater treatment facility in violation of permit requirements and an administrative order. The judgment required the defendant to pay a $33,000 penalty and to cease all operations at the facility until the proper permits and approvals were obtained.

The division filed suit against *Lamson & Goodnow Manufacturing Co.*, a manufacturer of cutlery in Shelburne Falls for illegally discharging wastewater onto the ground and into the Deerfield River. Under a consent judgment, the company was required to pay a $25,000 civil penalty for its past discharges, and to comply with the law by installing a recycling system to prevent further discharges.

A lawsuit was filed against *Colby-OK Yarn, Inc.*, a textile manufacturer, and *S.S. Kay Realty Trust*, the owner of industrial property in Worcester, for illegally discharging dyeing products into the Blackstone River. A consent judgment filed required the defendants to pay a $21,000 civil penalty and, under DEQE supervision, remove materials remaining on the property.

The division filed a consent judgment settling a lawsuit against *Buckley & Mann, Inc.*, a textile manufacturer in Norfolk. The complaint alleged that the company had violated the Clean Waters Act by discharging wastewater without a DEQE permit. The judgment required the company to cease its discharge, perform a comprehensive site assessment, and pay a $10,000 civil penalty.

The Attorney General obtained a consent judgment against *Premoid Corporation*, a West Springfield paper manufacturer, and *James River Corporation*, the new plant's owner, for violating the Clean Waters Act. The complaint charged

Premoid with unlawfully discharging wastewater into a river by diverting flow from its manufacturing process during a backup in the facility's wastewater system. The consent judgment requires changes to prevent future malfunctions, and the payment of a $8,000 civil penalty for the one-time discharge.

The SJC upheld a decision by the DEQE to issue an air pollution permit for the diesel-powered cogeneration plant built by Harvard University to provide electricity, steam, and chilled water to hospitals in Boston's medical school area *(Town of Brookline)*. DEQE had issued a permit for the plant after finding that the plant would not pose any significant threat to the public health. The SJC affirmed DEQE's decision, upholding DEQE's approach to assessing the reasonableness of risks posed by activities that cause air pollution.

The division filed a consent judgment settling a lawsuit against *J. T. Leigh & Co.*, a manufacturer of coated paper products in Springfield. The lawsuit charged the company with emitting volatile organic compounds into the air without approval and in excessive amounts, in violation of the Massachusetts Clean Air Act. The consent judgment required the company to come into full compliance with air pollution regulations, and to pay a civil penalty of $22,500.

A final judgment was entered in a lawsuit brought against *Coastal Energy, Inc.* for illegal removal and storage of asbestos at sites in Millbury and Shrewsbury. The judgment required the defendant to pay $21,950 in civil penalties.

The division filed suit against the *City of Quincy* for operating its landfill without required state plan approvals and in violation of an administrative consent order. After four days of testimony by representatives of the DEQE and the city, the Superior Court issued a preliminary injunction. Concluding that the landfill had become an "ecological disaster," the court enjoined continued use of the landfill, and required the city to take various steps to remedy the conditions there.

A consent judgment was filed settling a lawsuit against the *Town of Methuen,* requiring the town to bring its municipal solid waste landfill into compliance with all environmental requirements. The judgment required Methuen to upgrade the day-to-day operation and maintenance work at the landfill, to conduct a complete investigation of potential groundwater contamination, and to take any action required by DEQE to remedy any groundwater contamination. The judgment further required Methuen to place $100,000 in an account, and to pay penalties from that account into the General Fund of the Commonwealth should the town fail to comply with the judgment.

In *Parkinson v. Board of Assessors of Medfield,* the SJC reversed an earlier decision and issued a new opinion in this case involving the validity of conservation restrictions. The Attorney General, appearing as amicus curiae, had petitioned the Court for revision of its initial decision. In this case, a taxpayer sought to achieve favorable tax treatment from a conservation restriction she had put on her land. The SJC initially denied her the favorable tax treatment, holding that the underlying restriction was invalid. Because the opinion had the effect of invalidating all similar conservation restrictions across the Commonwealth, therby undermining the statutory conservation restriction program, the Attorney General filed a Petition for Rehearing as amicus curiae. The petition argued that the conservation restriction should not have been ruled invalid, regardless of whether or not she was entitled to favorable tax treatment, because the restriction served the statutory purpose of retaining the land predominantly in its natural

and open condition, and it had been properly approved by the town and the Secretary of Environmental Affairs. The courts revised opinion adopted the arguments presented by the Attorney General.

INSURANCE

The Insurance Division represents the interests of Massachusetts citizens who purchase insurance. A significant portion of the division's work involves advocacy on behalf of consumers in insurance rate proceedings. The division intervenes in complex hearings including automobile and health insurance rate setting.

The division also litigates against insurance companies, stock brokers and insurance agents on behalf of consumers. Cases are brought to obtain injunctive and restitutionary relief for insurance consumers.

The division also routinely participates in legislative and administrative hearings concerning proposed laws, regulations and other policy issues.

The actions of the division saved Massachusetts consumers $565 million this year.

The Insurance Division intervened in a major *administrative hearing* with over one-half billion dollars at issue in the 37.2% proposed *auto insurance rate increase.* The projected cost to Massachusetts policyholders would have been $550 million, or an increase of $186 for the typical driver.

Following an 86-day hearing, the Commissioner of Insurance ordered an 8.4% increase in 1987 automobile insurance premiums. The decision established rates $525 million lower than the industry's request for a savings to consumers of more than $140 per insured car.

Medex is insurance bought by approximately 450,000 individual elderly and disabled people in Massachusetts to supplement Medicare. In October, 1986 the Attorney General's Insurance Division recommended that the Insurance Commissioner reject a *Blue Cross/Blue Shield* rate increase request of 9.4% or nearly $20 million. After a 25-day hearing the Insurance Commissioner rejected the Blue Cross/Blue Shield rate hike proposal and allowed no increase in Medex rates.

The Insurance Division intervened for the first time in the *medical malpractice rate hearing* during this fiscal year. The Legislature, during the summer of 1986, provided for a direct pass-through of medical malpractice rate increases to Blue Shield consumers. The Insurance Division's intervention in the hearing focused on issues involving the establishment of the subsidy mechanism and the determination of costs passed through to consumers.

The division filed several briefs stating the Attorney General's views on the statute which created the subsidy of doctors' malpractice rates by Blue Shield insurers. As a result of the Insurance Division's efforts, the cost to Blue Shield subscribers was reduced from $34 to $13.9 million, a savings of $20.1 million.

The division has reactivated litigation against two brokerage firms, Paine Webber Jackson & Curtis and Shearson/American Express, on behalf of the approximately 770 Massachusetts residents who invested roughly $23 million in *Baldwin United annuities.*

Paine-Webber and Shearson-Lehman unsuccessfully sought to block our suit pending the outcome of private actions that are being litigated in the U.S. District

Court for the Southern District of New York. In rejecting the defendants' motions to stay, the Superior Court adopted our argument that the Attorney General's authority to bring actions in the public interest is not preempted by private litigation.

The court granted the Commonwealth's discovery motions ordering document searches of the defendant's Massachusetts offices and requiring Shearson to produce certain specified documents or submit affidavits or other evidence explaining why such documents are not available.

The Insurance Division secured judgments against two *insurers who had marketed life insurance to the elderly* as an estate planning tool in a deceptive marketing scheme which falsely claimed that inheritance taxes could only be avoided by buying life insurance. Restitution of $276,000 was secured for about 500 senior citizens, and the defendants paid civil penalties and costs of $46,000 to the Commonwealth.

The Insurance Division reached an *agreement with Quincy City Hospital* concerning adequate disclosure of the hospital's *tax deferred annuity plan* offered through Connecticut Mutual Insurance Company. Certain employees were not informed that withdrawing from the plan could bring contingent deferred sales charge. The Attorney General received and distributed $5,956.53 to 25 hospital employees for restitution of the charges.

The Insurance Division obtained restitution totalling $88,232.95 for 73 elderly consumers who purchased *insurance from agents of seven insurance companies.* These agents had conspired to make fraudulent claims which led these consumers to purchase duplicative or unnecessary insurance. In addition to restitution, $4,214.85 in costs to the Commonwealth was paid.

The division brought actions against a number of *employers and insurers for failure to pay health insurance benefits to employees.* These actions involved violations of Massachusetts mandated benefits laws and the failure of employers to remit health insurance premiums to insurers after withdrawing them from employees' paychecks. Restitution in these cases exceeded $18,000.

In July of 1986, Attorney General Shannon presented testimony on the *liability insurance "crisis"* before the Tennessee Governor's Task Force to Study Tort Liability Insurance. In his testimony, the Attorney General urged the task force to avoid making drastic and permanent changes that would adversely impact the rights of victims because it is unclear whether or not such changes would resolve the insurance crisis.

The Division of Insurance has continued its efforts to eliminate *sex discrimination in the premiums and benefits under insurance policies.*

The Secretary of Consumer Affairs requested a formal opinion as to whether the Commissioner of Insurance has the authority to promulgate regulations prohibiting insurance companies from charging men and women different premiums for insurance policies and paying them different benefits. On January 6, the Attorney General issued an opinion which stated that the Commissioner does have such authority.

The Commissioner has issued a regulation effective September, 1988, which prohibits the use of gender in determining the level of premiums and benefits for newly issued and renewed policies.

This year the division participated in *hearings* on such issues as *long term care for the elderly,* the *Commonwealth Automobile Reinsurance deficit assessment rules,* proposed regulation on *procedures for the conduct of hearings of motor vehicle insurance rates,* and a hearing on proposed regulations on *cost and expense containment standards for motor vehicle insurers.* In addition, the Insurance Division participated in the effort to develop patient care assessment regulations in concert with the Board of Registration in Medicine.

Additionally, resolution of *individual consumer complaints* resulted in the return of $16,452.89 to those consumers.

PUBLIC CHARITIES

The Attorney General represents the public interest in the proper solicitation and use of all charitable funds. The Attorney General's enforcement role extends to a wide range of charitable activity to protect donors from diversion and waste of funds, and to ensure that the beneficiaries of charitable funds receive the intended benefits.

The division's work falls into three main areas:

(a) registering and receiving financial information from charities and fundraisers to assure accountability for charitable funds;

(b) participation as an interested party in numerous estates and trusts in which there is a charitable interest; and

(c) litigation to protect the public from misapplication of charitable funds and from fraudulent or deceptive solicitation.

Under M.G.L. Ch.12 s. 8E, *all public charities,* with the exception of religious organizations and certain federally chartered organizations, *must register with the division.*

In cooperation with the Secretary of State, the division receives the Articles of Organization of newly filed G.L. c.180 non-profit corporations. The division reviews the Articles to determine if the non-profit is a public charity. If it is a public charity, information about the charity is entered on the computer, and the organization is sent annual reporting material.

This year 1,239 new charitable organizations' Articles were reviewed, determined to be charitable, and entered into the computer. More than 23,000 charities are registered with the division.

All registered charities must submit annual financial reports to the division. The registrations and financial reports are public record and public viewing files are kept. Annual filing fees of $25 per report totalled $235,755.

Under G.L. c.68, §19, *every charitable organization* which intends to solicit funds from the public, except religious organizations, *must apply to the division for a solicitation certificate* before engaging in fundraising. During the fiscal year, 2774 certificates were issued and $27,740 in certificate fees were received and processed.

Under §§22 and 24 of the new G.L. c.68, which took effect on April 9, 1986, all persons acting as professional solicitors or professional fundraising counsel for soliciting charitable organizations must register annually with the division. Solicitors must file a $10,000 surety bond and a copy of each fundraising contract signed with any charitable organization.

During the fiscal year ending June 30, 1987, a total of 116 registrations were received and approved. Fees received totaled $1,160. Of the registrations, 96 were renewals, and 20 were new registrations obtained as a result of increased enforcement of the registration requirement.

The division protects the public from misuse by non-profit organizations of their statutory license to fund raise through *charitable gaming activities,* including the conduct of fundraising Las Vegas Nights (Bazaars) and Raffles.

The division reviews the probate of *estates where there is a charitable interest.* This Fiscal year, 1629 new wills were received and reviewed, of which 1381 involved charitable bequests. Six hundred and forty-one executor accounts and 1901 trustees accounts were reviewed and approved. The division also reviewed and approved 107 petitions for sale of real estate and 31 petitions for appointment of trustees.

Sixty-eight new probate cases were opened, and division attorneys were involved in 450 other probate cases. These included petitions for *cy pres* or instructions to modernize or clarify outmoded trust terms. The division reviewed and/or was involved in 3680 other probate legal matters. The division's Probate Review Project resulted in closing 1256 cases where no further action is required.

As a result of our two year review of *trust funds held by Massachusetts municipalities,* we determined that more than $180 million was held by the Commonwealth's 351 towns and cities. Our review found 20 funds which, laying dormant for many years, had not fulfilled their nonprofit purposes.

The division also represents the State Treasurer in the *Public Administration of intestate estates* where the decedent has no heirs. Such estates escheat to the Commonwealth. The division ensures that the estates are promptly administered and that the state receives its money. During the fiscal year, $70,027.92 in escheats were received.

During FY 1987, the division's litigation included:

In *Attorney General v. Coalition For Reliable Energy,* our office filed a complaint in March 1987, alleging that the Coalition for Reliable Energy (the "Coalition") violated G.L. c.93A and G.L. c.12, §8 by deceiving the public to believe that it is a charity promoting all forms of reliable energy, but was actually an alter ego for the owners of Seabrook trying to obtain public support to promote their for-profit interests. The complaint also alleges that the Coalition's advertisements deceive the public into believing that all of Seabrook's costs will be paid for by consumers even if Seabrook becomes a canceled plant. At the close of the fiscal year, the case was in discovery, although the Coalition had filed a motion for partial summary judgment.

Several cases that were filed in Suffolk Superior Court in 1980 to compel agricultural societies to register and file reports with the division as public charities were handled by the division in FY 87.

Following oral arguments, Judge Tuttle issued summary judgment in September 1986, in *Bellotti v. Brockton Agricultural Society,* ruling that the Brockton Agricultural Society is not a charity because (1) it did not continously solicit or rely on gifts, depriving the Attorney General of jurisdiction because G.L. c.12, §8 regulates only solicitation; (2) Society by-laws did not specifically preclude inurement to stockholders; and (3) requirements for the Society's tax exemption under IRC §501(c)(5) and G.L. c.59, §5(4A) do not include all the attributes

necessary to be a charity.

On December 8, 1986, the division filed its appellate brief before the Supreme Judicial Court, and the SJC agreed to hear this appeal, along with that in the companion case of *Bellotti v. Weymouth Agricultural and Industrial Society,* which raises similar issues.

On April 7, 1987, the division presented oral arguments before the SJC in these companion cases. The core issue is whether these non-profit agricultural societies, which annually conduct agricultural fairs, constitute public charities subject to Attorney General regulation and are therefore unavailable as vehicles for private profit upon dissolution. The division argued that the societies satisfy the three basic elements of charitable status, in that (1) the fairs encourage agriculture, which is a charitable purpose; (2) they benefit the indefinite public, rather than the Society's stockholders; and (3) they are non-profit. The division also argued that those elements of charitable status are unaffected by the Societies' reliance on fees rather than gifts, their issuance of stock, their incorporation and exemption under statutes not denominated for "charities", and their own characterization of their activities.

In *Burbank Hospital v. Bellotti,* the Attorney General obtained agreement to a *cy pres* order protecting over $2 million in charitable funds. Burbank Hospital sought court approval of a corporate reorganization wherby two "parent" or "controlling" corporations were created, namely Cent Mass Systems Corporation and Acute Care Holding Corporation.

In reviewing the proposed restructuring, the division took particular care to insure that all umbrella corporations were organized and operated exclusively for the benefit of Burbank Hospital, and that all charitable assets were protected. Burbank Hospital is a charitable corporation established in 1890 to administer funds bequeathed to the City of Fitchburg under the will of Gardner S. Burbank for the purposes of erecting a hospital and paying for medical services rendered at the hospital to persons otherwise unable to pay for them.

The division handled several cases involving fraudulent and deceptive charitable fund-raising practices by solicitors. In *Bellotti vs. American Postal Workers Union of Massachusetts* and *Bellotti vs. Capricorn Publishing Co. Inc.,* Capricorn Publishing Co., Inc. was charged with impersonating postal workers who were raising money to grant the dying wishes of terminally ill children. In October 1986, Judge Harry Elam granted a preliminary injunction ordering the defendants to disclose their identity as paid professional fund-raisers and also the nature and purpose of the solicitation. The Judge further enjoined the defendants from impersonating postal workers, and ordered them to comply with the registration and bonding requirements of M.G.L. c.68.

In *Attorney General v. Norman Fishman, et al.* the defendants solicited funds both by using the names of actual charities without their knowledge, and by asking for contributions for the "Senior Citizens Directory", a non-existent entity ostensibly organized to benefit senior citizens. In this scheme, the defendants kept most, if not all, of the money raised in the name of charity.

The Attorney General entered into a consent judgment with one of the defendants in this case, Carl Lamana. Under this judgment, Lamana agreed to refrain from all solicitation activity in the Commonwealth for four years from the date of entry of judgment, and to comply with all requirements of the Massachusetts

Solicitation Statute, should he decide to solicit in the Commonwealth at a later date. He also waived any claim to money seized from the "Senior Citizens Directory" bank account, and paid $200 to the Commonwealth for investigative costs. Proceedings against the other defendants in this case are continuing.

The case of *Attorney General v. CMC Internet, Inc., et al.* involved the failure of the defendants to inform donors that they were professional fundraisers and not volunteers for the National Kidney Foundation, and the percentage of the money raised which would actually be used to support camperships for children receiving dialysis treatment. The defendants also failed to provide the address or telephone number of the National Kidney Foundation.

The Attorney General signed a consent judgment, whereby the defendants agreed to comply with all disclosure and registration requirements of the Charitable Solicitation Act in the future. They also paid a civil penalty of $5000 for their past violations of the statute and a penalty of $10,000 for each violation should they fail to comply with the judgment.

Attorney General v. Telco Communications et al. and *Telco Communications v. Attorney General* involved the 13-member Holbrook police union which signed a contract with Telco Communications of Pawtucket, RI, a professional soliciting company raising money by selling ads in an educational handbook. The union planned to use its share of the profit money for charity.

The Attorney General brought suit over that contract, plus a similar one involving the Franklin police union, because provisions in the contract violated M.G.L. c.68. The suits triggered a court battle over the constitutionality of the state's charitable fund-raising law, which limited professional soliciting companies to receiving no more than 25 percent of the total raised through the solicitation. (c.68, §21.)

The Attorney General sued Telco in May 1986 in Suffolk Superior Court. Telco removed the case to federal court and filed a countersuit against the Attorney General, claiming that the state's law limiting its income to 25 percent of the gross revenues was unconstitutional because it impinged on the charity's freedom of speech guaranteed under the First Amendment. The Attorney General argued that Section 21 was necessary to prevent overreaching conduct and excessive fee-taking by the solicitors and to protect the integrity of charitable giving.

On December 31, 1986, Judge Caffrey declared that c.68, §21 is unconstitutional. The Attorney General filed an appeal to the First Circuit Court of Appeals.

In *Bellotti v. United Funding*, the Florida-based professional solicitation company agreed to refund 50% of the contributions to all donors deceived by the company's fraudulent solicitation practices as part of a settlement of the civil contempt action brought by the Attorney General.

Letters notifying 5000 individuals of their entitlement to a refund were sent by this office. The refunds were sent completed in December with approximately $20,000 returned to donors.

In *Bellotti v. Atlantic Vegas Rental, Waitze, et al.*, the complaint was filed against a supplier of casino equipment to non-profit organizations authorized to run Las Vegas Nights as fundraisers. The complaint alleged that the defendants ran numerous events where there was no charitable sponsor or where the advertised charitable sponsor was paid for the use of its name. The defendants also provided dealers for the blackjack tables and operated the craps table, both violations

of Massachusetts law.

In the consent judgment obtained, the defendants paid a $15,000 fine, the largest ever obtained against a casino supplier. The defendants also agreed to comply with the requirements of c.271 and to submit all contracts to the division for monitoring for five years.

After extensive investigation and negotiation in *City of Boston and George A. Russell, Collector-Treasurer, as Trustee v. Attorney General,* the division agreed upon a set of 11 proposed judgments for *cy pres* with the City of Boston Trust Department. Each judgment relates to a separate trust fund held by the city as trustee. The funds had become underutilized due to outmoded and/or unclear trust purposes. The judgments will free $800,000 in funds for the homeless, scholarships for Boston students, books for poor children and park land purposes.

The trustees of the Cobb trust sought *cy pres* relief in *David B. Cole, Trustee u/w/o Enoch T. Cobb v. Town of Barnstable, Airport Commissioners and Attorney General* to allow the sale of valuable land holdings. The Attorney General assented, provided that the $2 million in proceeds be held as trust principal which may not be invaded and, that the income will be used exclusively for educational needs in Barnstable that are not met by the town's school budget.

UTILITIES

By statute, the Attorney General is the designated representative of Massachusetts ratepayers in utility rate matters. The Utilities Division is the primary, and in most instances, the only representative of the consumer interest in gas, electric, and telephone rate cases and related matters within Massachusetts.

The rate cases in which the Attorney General appears are heard and decided by the Department of Public Utilities (DPU). The division also appears in cases on behalf of Massachusetts ratepayers before the Federal Energy Regulatory Commission (FERC). This federal intervention is essential since FERC establishes nearly all of the purchase power rates charged to four of the eight retail electric companies serving customers in the Commonwealth. FERC also has wholesale rate jurisdiction over all of the Massachusetts utility investment in Seabrook, with the exception of MMWEC.

During fiscal year 1987 the Utilities Division continued aggressive litigation including the following cases:

1. *Seabrook Litigation before the Department of Public Utilities (DPU) and the Federal Energy Regulatory Commission (FERC)*

The Attorney General reached a stipulated settlement with *Montaup Electric Company* limiting Montaup's right to charge Eastern Edison Electric Company for 18% of its investment in the cancelled Seabrook Unit 2. Eastern Edison serves retail ratepayers in southeastern Massachusetts. Under the terms of the settlement, Montaup's recovery was limited to $13.8 million; Montaup had requested $21 million. The case was litigated before FERC.

Several Massachusetts utilities which own portions of the Seabrook nuclear project petitioned the DPU to authorize startup costs for *New Hampshire Yankee Electric Company*. The purpose of the new company would be to manage and operate the Seabrook plant and to serve as a conduit to pass expenses onto the joint owners. We opposed this financing petition on the grounds that it did not meet the Department's standards: it would not be in the public interest, and is not reasonably necessary for a legitimate utility purpose. The decision was pending at fiscal year end.

Proceedings before the DPU involve significant policy issues of state jurisdiction over electric supply practices of local retail electric companies. The proceedings involve applications by *Cambridge Electric Light Company and Commonwealth Electric Company* to include in their fuel charges to customers, costs associated with the cancellation of Seabrook Unit No. 2 as charged to these companies by their wholesale affiliate, Canal Electric Company. The Attorney General intervened and was granted a 90-day hearing. The retail companies contend that the DPU is preempted from reviewing these applications because of the federal review of Canal underway in ER86-704-001. The Attorney General argued that the DPU has the authority to determine the prudence of retail company action, and should assert that jurisdiction and deny pass through of Seabrook 2 costs. The DPU decision was pending at fiscal year end.

New England Power Company (NEP), a 10% owner of Seabrook, has asked the FERC to find it prudent in its Seabrook 1 investment, and to make other changes in its rates. NEP sells 100% of the power sold to customers of Massachusetts Electric Company, the Commonwealth's largest retail electric company. The Attorney General has intervened in the proceeding on behalf of those ratepayers. This case is expected to take at least another year to resolve.

Massachusetts Municipal Wholesale Electric Company (MMWEC) is a coalition of cities and towns which invested heavily in the Seabrook nuclear plant during the last decade. The Attorney General opposed MMWEC's petition to the DPU for authorization to issue more bonds to finance MMWEC's share of Seabrook. We have opposed MMWEC's Seabrook participation consistently over the years, arguing that MMWEC failed to show either that Seabrook would be economic or that its ratepayers could be insulated from the risks of additional debt. Despite the Attorney General's opposition, the DPU allowed MMWEC to issue bonds to finance the additional burdens of its substantial share of Seabrook.

The Attorney General is a party in the proceeding before the FERC involving *Canal Electric Company's* proposal to include the costs associated with its investment in the cancelled Seabrook Unit No. 2 in rates charged to its retail company customers, Commonwealth Electric Company and Cambridge Electric Light Company. Canal proposes to charge its customers approximately $22 million over a three-year period.

The Attorney General has engaged in extensive discovery since December 1986 on the prudence of Canal's investment in Seabrook Unit No. 2. The trial is scheduled for the late fall of 1987.

2. *Retail Rate Cases and Other Regulatory Matters Before the DPU*

As a result of the Attorney General's 1983 petition, the department is continuing its investigation of *New England Telephone Company's* (Phase One) costs with a view to setting new telephone rates for all of NET's customers. A central issue is whether basic local monthly rates should be decreased while long distance and other rates are increased.

Our concern is that captive (monopoly) residential local customers not be forced to subsidize New England Telephone's competitive ventures—including long distance and sophisticated business services. We are also concerned that all pay phones continue to charge 10 cents for local calls, a rate at which NET can cover its costs and make a profit.

In our briefs in the first phase of the case, we recommended rate classes and allocation methods which would help to ensure that users of residential exchange services have fairly priced rates. We also recommended regulation of non-NET pay phones. Before the Commission, we urged the DPU to require NET to file evidence as soon as possible on which a rate decrease could be based. The Commission ordered such a filing be made by January 5, 1987. The investigation of the company's rates in Phase 1 was ongoing at fiscal year end.

In a related proceeding, the DPU ordered all utilities including NET to reduce rates as of July 1 to reflect tax reform reductions. In a particularly noteworthy effort, the financial analyst for the Utilities Division, convinced the DPU that New England Telephone's reduction should be $42 million, instead of the $29 million proposed by the Company.

New England Telephone (Phase Two) initially proposed a rate increase of $77 million per year or about 5%, and then revised it to $121 million. The Attorney General's five witnesses proposed rate *decreases* totalling more than $150 million or 10%. Our witnesses testified that NET costs should be cut for rate of return, depreciation, unnecessary investments in plant, income taxes to reflect the federal tax cut, profit-sharing transactions with unregulated affiliates, and a large number of smaller cost items. In cross-examination we identified a number of other costs that should also be reduced.

Because such a potentially large decrease is at stake, we asked the DPU to make NET's current rates subject to a refund consistent with the decrease rate the Commission ultimately orders.

A later phase of this case will determine how rates should be allocated among the many customer classes and services. We have argued, and will argue in the next phase, that long distance and other charges should be raised to fully reflect their shared use of the local telephone network. This would lower local residential rates.

On January 28, 1987, the DPU ordered the utility companies under its jurisdiction to file plans to reflect *the effect of the Tax Reform Act of 1986 in customers' rates*. The companies were asked to provide this information to the department by February 27, 1987. Depending on the utility, the changes in the tax law could lower customers' rates one to five percent.

The Attorney General filed comments regarding the submission of the companies' plans on March 10, 1987. We asked the utilities to comply with the Department's request by providing specific calculations of the companies' revenue requirement based on the federal tax rate at 34% using the companies' last rate case. In addition, we requested that the companies also provide the methodology to return the excess accumulated deferred income taxes associated with accelerated depreciation. The DPU eventually ordered all companies to institute an across-the-board rate decrease reflecting reduced tax liability.

The *Essex County Gas Company* filed a rate case with the DPU seeking to increase its annual operating revenues by approximately $1.8 million or about 5.6%. The company also asked to redistribute revenue recovery among its customer classes which would bring significantly larger than average increases from residential consumers. The Utilities Division represented consumers in this case.

The Attorney General's initial brief was filed August 7, recommending that all but about $200,000 of the proposed increase be disallowed. We also asked the DPU to strictly limit any shift of revenue responsibility to non-heating residential customers, for whom the Company is seeking substantial increases in rates.

Every three years the *Federal Communications Commission (FCC) examines and sets New England Telephone's interstate depreciation rates* which are then be charged to Massachusetts customers. NET seeks to increase the depreciation expense borne by Massachusetts customers by over $100 million.

The interstate rate setting process generally has been limited to the FCC, NET, and the Department of Public Utilities. This year, the Attorney General met with the FCC staff to discuss the company's depreciation proposal. Upon request, the Attorney General then submitted an outline of his position on various accounts to the FCC staff, which was subsequently distributed to the DPU as well as the parties to 86-33.

Bay State Gas Company requested approval from the DPU to guarantee certain obligations of its subsidiary, Granite State Gas Company, an interstate natural gas pipeline office. The Attorney General opposed two of Bay State's requests involving its guarantee of Granite State's issuance of credit and incurrence of debt, worth about $2 million. The Attorney General opposed the guarantees because they placed Bay State ratepayers at a risk not commensurate with potential project benefits. The DPU approved the guarantee of the letters of credit. Bay State withdrew its request for the debt guarantees.

The department adopted the position advocated by the Attorney General, and rejected Bay State's application to assign certain gas supply contracts to Granite State. The DPU indicated that Bay State must receive its approval prior to the assignment.

In this rulemaking, the DPU proposes to set rules regarding the *ratemaking treatment of future major construction projects*. The Attorney General has urged the Department to set rules now to encourage least-cost planning including conservation.

Utilities had proposed rules that would give them recovery of all prudent expenditures on power plant construction regardless of the economics. The Department rejected this position. The Attorney General had urged the Department to only allow a full return on plant investments that are prudently made and that are economic for and needed by ratepayers. We urged the Department to regularly monitor the construction of new plants to review for prudence and economics. Most important, we urged that rates be set to encourage conservation, since that is the least-cost supply of electricity.

We pointed out that Massachusetts utilities spent about $3 billion on four large nuclear plants. Two of the plants were not completed and the other two are neither economic nor necessary. These four plants now cost customers of the investor-owned utilities about $200 per year. We urged the Department to set rules to prevent this from occurring again. The rulemaking was still pending at fiscal year end.

The Attorney General is investigating the causes for the *outage at Pilgrim* which began in April 1986 and is still ongoing. We will represent ratepayers in proceedings before the DPU and defend against customer payment for any management imprudence which caused or prolonged the outage. This case was still in the investigating and discovery phase at fiscal year end.

After several months of investigation and negotiation with *Massachusetts Electric*, the Company and the Attorney General reached agreement for a $17 million rate reduction and to allocate a large portion of the decrease to residential customers. This stipulation between the two was submitted to and approved by the DPU in June 1987, resulting in July 1 rate decreases for customers of Mass. Electric.

The Attorney General intervened in the annual review of *Boston Edison Company's* operation of its fossil generating units. In our brief filed in March, we argued that the Company had acted imprudently and had inefficiently operated Mystic 4, Mystic 7, and New Boston Unit 2, which led to several million dollars in excessive fuel costs. The DPU found the Company imprudent in certain aspects of its operations and ordered customer refunds.

Berkshire Gas Company sought a rate increase of $3,347,000—about 9%—in April 1988. The Company and the Attorney General negotiated a settlement, reducing the increase by about 33%. The stipulation was approved by the DPU on August 29, 1987.

The DPU's decision on rate design on October 31, 1986 significantly rearranged rates for different customer classes. The decision produced mixed results. On principle, the DPU accepted many of the Attorney General's arguments on rate design, and based on our positions, rejected several special rates for large customers. However, over the Attorney General's objection, the DPU accepted Company designed rates which result in significantly lower rates for industrials, and higher rates for residentials.

Colonial Gas Company requested DPU approval of an unregulated subsidiary that would invest in cogeneration plants. The Attorney General asked the DPU to dismiss the petition for failure to make a specific proposal and failure to file evidence of benefit to ratepayers. Alternatively, we urged denial of the petition because the risk of harm to ratepayers from cross-subsidizing the proposed deregulated cogeneration subsidiary is not outweighed by ratepayer benefits. We

also discussed broader policy issues, such as the dangers from over-reliance on gas cogeneration and costs to ratepayers of allowing utilities to diversify into deregulated businesses.

The *Colonial Gas* proceeding is an extension of the proceeding in which the DPU rejected two promotional gas rates, as the Attorney General urged.

After 15 days of hearings, the Attorney General filed Initial and Reply Briefs advocating principles of marginal cost rate design and partial movement to levelized class rates of return. This case was still pending at fiscal year end.

Western Massachusetts Electric Company (WMECO) filed an application for a rate increase of $23.5 million in December, 1986. Of the total, $20.5 million is for the second stage of the Millstone 3 nuclear power plant recovery as ordered by the DPU in 1985, with the balance for cost of service items.

By cross-examination and in direct testimony by two witnesses, the Attorney General showed that (1) the Company's cost of service should be reduced by $16 million; (2) residential rates should not be increased at all since the only justification for an increase is to cushion a cost-justified above-average increase to the building rate classes; (3) there is no theoretical or practical reason for the Commission to change its new rate design method which encourages conservation while rewarding low-usage largely low-income customers; (4) our study and analysis proves the Commission's fears unwarranted that its new rate design will injure the utility or the economy of Western Massachusetts; and (5) the Commission's rate design will stimulate employment by encouraging the use of labor as a substitute for uneconomic consumption of electricity.

On June 30, 1986, the DPU issued its order in the general rate case. In the revenue requirements portion, the Department ordered many of the adjustments recommended by the Attorney General and awarded the Company a $12.5 million increase. A significant issue which has been noted by national industry press was the Department's acceptance of the Attorney General's recommended denial of the Company's request to charge ratepayers for the insurance premium associated with directors and officers liability. A major disappointment was the Department's decision to change the rate structure. The Attorney General has filed a motion seeking reconsideration on this point, asserting that the Department's rate structure will discourage cost effective energy conservation and result in the demand for new and costly power plants.

The Attorney General and the DPU have received an unusually high number of complaints relating to the new *group bridging telephone service* initiated in January. The service permits callers to join a conversation group, but costs 10 cents per minute and is, in part, marketed to teenagers. Outraged parents have complained about several hundred dollars in monthly costs, lewd language, and undesirable social contacts. The Attorney General urged the DPU to order the service be restricted to subscribers using a personal code number and that the billing be done by the vendors, not NET. We have opposed termination of local service as a result of non-payment of charges for use of this service.

We also recommended that to avoid billing complaints, the teen lines should only be available on a subscription basis. In its decision, the DPU rejected that course, but adopted our recommendations for tariff revisions which should help to reduce billing complaints.

NUCLEAR SAFETY

1. Seabrook Nuclear Power Station

The litigation over the *Seabrook Nuclear Power Plant* entered its twelfth year. The Attorney General challenged the issuance of both a fuel-loading and pre-critically testing (''zero-power'' operation) license and a low-power license for Seabrook. The issuance of the fuel-loading licensing was appealed both to the Nuclear Regulatory Commission (NRC) Appeals Board and the NRC Commission.

Although a fuel-loading license was issued, the Attorney General ultimately won the issue before the Commission, and obtained a stay of the low-power license until the utility submitted radiological emergency response plans to the NRC for that portion of the Seabrook Station 10-mile emergency planning zone (EPZ) within Massachusetts. The Attorney General later won a further stay of the low-power license when the Commission ruled that the emergency plans ultimately submitted by the utility (the very same plans that Massachusetts had rejected as unworkable) were not *bona fide* emergency response plans.

The Attorney General also participated in hearings on remaining plant safety contentions in the on-site licensing proceedings. The Licensing Board agreed with the Attorney General that the utility's Safety Parameter Display System (SPDS), a post-Three Mile Island requirement designed to ensure early warning of accident conditions, was inadequate and ordered the deficiencies corrected prior to full-power operation.

In addition, the Attorney General was actively involved in challenging the state of New Hampshire's emergency evacuation plans as inadequate in evacuating Massachusetts residents from New Hampshire beaches near the plant. The Attorney General further successfully opposed the utility's efforts to have the NRC reduce the emergency planning zone (EPZ) from 10 miles to eliminate Massachusetts from the EPZ.

Finally, the Attorney General filed comments objecting to proposed NRC rulemaking that loosened safety standards in NRC licensing proceedings for the Seabrook and Shoreham, New York utilities.

2. Vermont Yankee

The Attorney General sought, and was granted, the right to a hearing on *Vermont Yankee Nuclear Power Plant*'s request for an amendment to its operating license, which, if granted, would have allowed the plant to expand its spent fuel pool. The Attorney General has alleged that in the event of an accident at the plant, an expanded spent fuel pool could result in greater radiological risk to the public, and that there are safer ways to expand the spent fuel pool. The Attorney General has been engaged in hearings on this issue before the NRC.

SPECIAL LITIGATION

In a Chapter 11 bankruptcy proceeding, the Commonwealth filed a $122 million claim in 1983 against *Johns-Manville* for the cost of removing, repairing and otherwise managing *asbestos-containing products* manufactured by the company which are present in many of the more than 5,000 state buildings.

The Attorney General not only represented the Commonwealth's claim, but continues to serve as Chair and Chief Negotiator for the State Government Creditors Committee, a group of 35 Attorneys General whose states filed claims in excess of $5 billion. The department played a key role in negotiations with Manville, other property damage creditors, other creditors, and the representative of future health claimants. This office also helped negotiate the establishment of a property damage settlement trust and prepared a draft of the standards to be used by the Trust for payment of property damage claims. After a trial before a panel of three jurists, the panelists issued statements very much like those originally proposed by the property damage claimants. The standards govern the payment of all property damage claims filed against Manville in the Chapter 11 proceeding.

After a full hearing, the Commonwealth and the other members of the State Government Creditors Committee were awarded all of their out of pocket expenses and 75% of their legal fees by the Judge. The Committee's fee and expense request was allowed and accompanied by statements by the court and debtor about the Committee's "very substantial contribution" to the case, and the "absolutely indispensible" services it rendered. The $185,971.10 award covered the Committee's expenses from its first involvement in the case in 1984 through December, 1987. Massachusetts' share of actual expense awarded was $12,826.72. The Court also awarded $396,170.99 to the Committee in legal expenses, about 75% of the request. Massachusetts' share of the legal expenses award was $118,294.12. The Court will consider requests for future expenses and legal fees, as well as requests for the balance of fees through December 1987, after consummation of the Plan of Reorganization.

These awards were highly unusual and precedential, in that they were made on an interim basis and were made to public sector attorneys working in behalf of an unofficial creditors committee.

The Department also filed a claim on behalf of the Commonwealth and 39 municipalities in the *Johns-Manville* Chapter 11 bankruptcy proceeding for Manville's manufacture and sale of *drinking water pipe* that leaches tetrachlorethylene, a known animal carcinogen and a suspected human carcinogen into the drinking water supply. After extensive discovery and three days of trial before Judge Lifland in the U.S. Bankruptcy Court in the Southern District of New York, the claim was settled for $4.25 million.

Payment of the claim, pursuant to the Plan of Reorganization, was to be in the form of certain instruments, including debentures and stocks. Given the fact that payments would be extended into the next century and payment would be contingent on the successful resolution of the bankruptcy proceeding and Manville's continued ability to pay, the Commonwealth and the 39 affected municipalities agreed to sell the Pipe Claim to the investment firm of Heine, Geduld, Inc. for $3.95 million. The sale was completed in July of 1987, and

distribution made shortly thereafter, bringing this complex litigation to a close.

On December 30, 1986, the Commonwealth filed a claim in the *UNR Inc.* Chapter 11 bankruptcy proceeding in the U.S. Bankruptcy Court for the Northern District of Illinois, Eastern Division. UNR was a former manufacturer of asbestos products which were used in building construction.

The Commonwealth's claim was for expenses incurred and those anticipated in the abatement—including removal, repair and replacement—of all asbestos production in the Commonwealth's public building. The claim sought the portion of $396,000, the Commonwealth's total asbestos related claim, which is determined to be UNR's actual liability. Discovery is proceeding on a coordinated basis with other states which filed similar claims.

The department participated for months as a panel member in *EPA's Negotiated Rulemaking* process for the drafting of proposed rules required under the *Asbestos Hazard Emergency Response Act (AHERA).* The proposed rules mandate action by management of school buildings which contain asbestos. Although the negotiated rulemaking process was intended to result in proposed rules on a consensual basis, the industry's serious commitment of resources to ensure rules favorable to their litigation position produced rules that made consensus impossible. Six representatives, including Massachusetts, withheld approval of the proposed rules. The proposed rules were published in late April 1987. The Commonwealth, and a number of other states, filed comments.

GOVERNMENT BUREAU

The Government Bureau has three functions: (1) defense of lawsuits against state officials and agencies concerning the legality of governmental operations; (2) initiation of affirmative litigation on behalf of state agencies and the Commonwealth and (3) legal review of all newly-enacted municipal by-laws, pursuant to G.L. c. 40, 32.

A report of significant activity during fiscal year 1987 follows.

Litigation. The Government Bureau defends the Commonwealth and its officials and agencies in litigation in state and federal courts, and, in certain cases, before federal administrative agencies. These proceedings typically involve challenges to the validity of governmental decisions, initiatives, regulations, or statutes, and raise important issues of administrative and constitutional law in diverse subject-matter areas.

During Fiscal Year 1987 the bureau opened 443 new cases and closed 695 active cases. In addition, the bureau supervised and monitored the trial court defense, by Department of Public Welfare attorneys, of 50 new welfare benefits cases.

The Government Bureau represented the Commonwealth successfully in three cases in which the Supreme Court declined to overturn lower court decisions favorable to the Commonwealth. The Government Bureau also prepared and filed an amicus curiae brief on behalf of 28 states, successfully challenging a method of determining attorneys' fees which resulted in excessive awards against the states. The high court's denial of review in *Commonwealth Electric v. Department of Public Utilities* vindicated a DPU order prohibiting the utility from passing on to consumers "imprudent" expenses incurred during a Pilgrim I outage in 1981-1982. Review was also denied in *Chongris v. Board of Appeals of Andover,*

in which the First Circuit had upheld state zoning laws against a due process challenge.

The U.S. Court of Appeals for the First Circuit decided 15 cases in which the Commonwealth or one of its agencies was a party. Noteworthy decisions included *Commonwealth v. Bowen*, in which the Court ruled that the U.S. acted improperly when it disallowed $11 million in Medicaid reimbursement claimed by the state. In *Rogers v. Okin* the First Circuit reduced an attorneys' fees award against the state by more than $500,000. The court accepted our claim that the Eleventh Amendment precluded charging the state for pre-judgment interest. The Court upheld the statutory ban on "balance billing" against a constitutional challenge in *Mass. Medical Society v. Dukakis*. In *Devereaux v. Geary* the First Circuit upheld an affirmative action consent decree against a reverse discrimination challenge. The U.S. Supreme Court denied the plaintiffs' petition for review.

In FY 1987, the Supreme Judicial Court decided 43 cases in which Government Bureau attorneys represented the Commonwealth. There were several important decisions upholding disciplinary sanctions imposed because of professional misconduct, including *Keigan v. Board of Registration in Medicine* (violations of controlled substance act); *Gill v. Board of Registration of Psychologists* (impropriety); *Fitzgerald v. Board of Registration in Veterinary Medicine* (malpractice and gross misconduct); *Intingaro v. Board of Registration of Architects* (perjury in bribery investigation, Single Justice session); *Rosen v. Board of Registration in Medicine* (violation of controlled substance act, Single Justice session); *Mitchell v. Board of Registration of Chiropractors* (excessive treatment and "unconscionably high" fees, Single Justice Session), Haran v. Board of Registration in Medicine (malpractice).

In *Amherst Nursing Home v. Commonwealth* the SJC held that the state could show cross-ownership of two nursing homes in order to recoup public assistance overpayments. In *Kraft v. Department of Public Welfare* the SJC approved the DPW's method of calculating the amount of reimbursement owed to the department for interim assistance provided to SSI applicants awaiting federal benefits.

The U.S. District Court decided 36 cases in which the Government Bureau participated. Significant decisions in the U.S. District Court included *Buchanan v. Demong*, in which the court held that state law governing unemployment compensation did not unconstitutionally discriminate against pregnant women.

On behalf of the Commonwealth and 11 other states, the Government Bureau filed an *amicus* brief in *Perpich v. U.S. Department of Defense*, concerning the right of the state to withhold consent from National Guard training exercises in Honduras.

By-Laws. Town by-laws, home rule charters, and amendments thereto are reviewed and must receive approval of the Attorney General prior to becoming effective. The review function is performed by attorneys in the Government Bureau. During the fiscal year ending June 30, 1987 the By-Laws Division reviewed 1,610 by-laws and 10 home rule charter actions from more than 300 towns. There were 84 disapprovals or disapprovals in part, making an error rate of 5 percent for the submittals involved.

The by-laws received this year consisted of 574 general by-laws and 1,036 zoning by-laws. General by-laws pertain to town government and the exercise of municipal power. The zoning by-laws are a continuing exercise of the police power

over the use of land. Zoning by-laws generate the most local controversy since they affect what the land owner considers as his constitutional right, i.e., to own, use and enjoy property.

This year saw continued attempts to control or regulate growth, including imposition of development moratoriums, overlay districts to protect groundwater sources and sewage or septic tank restrictions.

EXECUTIVE BUREAU

LEGISLATION

During fiscal year 1987, the Attorney General filed eleven pieces of legislation, three of which were enacted. They are: 1) an amendment to the Consumer Protection Act (C. 93A) to add securities and commodities to the definition of trade and commerce to which the statute applies; 2) an amendment regulating the review of sexually dangerous persons' petitions for discharge; and 3) an amendment regulating the penalties for violation of certain environmental laws.

The other bills included legislation to 1) authorize the use of civil investigative demands in enforcement of civil rights laws; 2) increase the assessment of the Utilities Division for representation of consumers in utility rate cases; 3) strengthen antitrust enforcement by proposing a number of revisions to the Consumer Protection Act; 4) clarify the requirements relating to the condominium conversion law; 5) permit deregulation of telecommunications services; and 6) to give the Attorney General authority to represent utility ratepayers outside the Commonwealth.

The division actively monitored the progress of approximately 200 bills, and became actively involved in 23 bills through meetings, letters, and testimony. The division also watched the activities of the committees as well as the floor action of the House and Senate.

ELECTIONS DIVISION

The major responsibility of the Elections Division is to *provide legal representation to the Secretary of State and the State Ballot Law Commission regarding election related issues.* During the fiscal year, the Elections Division also assisted the Local Election Review Commission in fulfilling its responsibility to insure that all cities and towns properly redrew local ward and precinct lines.

The Elections Division is responsible for *enforcing compliance with the state's campaign finance law by candidates and political committees.* (M.G.L. c. 55)

During fiscal year 1987, the Office of Campaign and Political Finance referred to the Attorney General 153 individual candidates or treasurers of political committees who failed to file the required financial disclosure reports. As a result of administrative action by the division, 83 reports were subsequently filed.

The Elections Division brought civil actions against the remaining 70 candidates or treasurers, with the court issuing orders requiring the filing of financial reports.

The Elections Division is also responsible for enforcing state statutes that *require legislative agents (lobbyists) and their employers to file financial disclosure*

statements with the Office of the Secretary of State. (M.G.L. c.3 s. 43,44,47) In fiscal year 1987, 17 violations of these sections were reported by the Secretary of State to the Attorney General. As a result of the action taken by the Elections Division, all reports have been filed with the State Secretary.

The division also *assists the State Jury Commissioner* in his efforts to have cities and towns submit census lists in a timely manner so that the jury selection process can be carried out effectively. With the assistance of the Elections Division, all cities and towns filed their respective reports without the need to seek court action.

WESTERN MASSACHUSETTS

The Western Massachusetts Division of the Department of the Attorney General is *responsible for legal matters in the four western counties* of Berkshire, Franklin, Hampden and Hampshire. The Western Division, located in Springfield, is staffed by investigators and attorneys.

The division litigates a wide range of cases, including tort, contract, eminent domain, worker's compensation, environmental, consumer protection, civil rights, administrative appeals, and victims of violent crimes. The division also prosecutes fraud cases for the Division of Employment Security.

Similarly, the investigators are responsible for a number of cases. In addition to investigating consumer fraud, investigators work closely with attorneys in developing their cases by interviewing witnesses, reviewing documents and accumulating and compiling potential evidence.

The division also handles consumer complaints and attempts to resolve them short of court action.

OPINIONS

The Attorney General is authorized by (M.G.L. c.12, s.3, 6, and 9) to render legal advice and opinions to constitutional officers, agencies and departments, district attorneys, and branches of the legislature. Opinions are given primarily to the heads of state agencies and departments.

The questions considered in legal opinions must have an immediate, concrete relation to the official duties of the state agency or officers requesting the opinion. In other words, hypothetical or abstract questions, or questions which ask generally about the meaning of a particular statute, lacking a factual underpinning, are not answered.

Opinions are not offered on questions raising legal issues which are the subject of litigation or that concern collective bargaining. Questions relating to the wisdom of legislation or administrative or executive policies are not addressed. Generally, federal statutes are not considered and the constitutionality of state or federal legislation is not determined.

Opinion requests from state agencies which report to a cabinet or executive office must first be sent to the appropriate executive secretary for his/her consideration. If the secretary believes the question raised is one which requires resolution by the Attorney General, the secretary then requests the opinion.

There are two reasons for this rule. The first concerns efficiency. Opinions of the Attorney General, because of their precedential effect, are thoroughly

researched and prepared. If a question can be satisfactorily resolved more quickly within the agency or executive office—by agency legal counsel or otherwise—everyone is better served. The second reason relates to the internal workings of the requesting agency and its executive office. It would be inappropriate for this department to be placed in the midst of an administrative or legal dispute between these two entities. These rules help to ensure that the agency and its executive office speak with one voice insofar as Opinions of the Attorney General are concerned.

If the agency or executive office requesting an opinion has a legal counsel, counsel should prepare a written memorandum explaining the agency's position on the legal question presented and the basis for it. The memorandum should accompany the request. When an agency request raises questions of direct concern to other agencies, governmental entities, or private individuals or organizations, the Opinion Division solicits the views of such interested parties before rendering an opinion.

The issuance of informal opinions is strongly discouraged. Informal Opinions of the Attorney General are often relied upon as if they were formal Opinions. In a number of instances, this reliance has been seriously misplaced. As a result, the issuance of informal opinions is strictly limited to situations of absolute necessity. It is made explicit that the informal opinions cannot be relied upon as if they were formal Opinions.

Between July 1, 1986 and June 30, 1987, 10 formal Opinions of the Attorney General were issued with an additional 89 requests considered, evaluated, and declined.

The formal Opinions follow:

July 14, 1986

The Honorable George Keverian
Speaker
House of Representatives
State House
Boston, MA 02108

Dear Speaker Keverian:

You have asked for my opinion, pursuant to G.L. c. 12, § 9, concerning the constitutionality of House 4476, a bill presently pending before the House of Representatives. House 4476 would amend chapter 39 of the General Laws to require that any circular or poster that advocates or opposes any article on a town meeting warrant conspicuously disclose the person or organization responsible for the writing.[1] Specifically, you have inquired whether the proposed law would violate any provision of the United States Constitution, particularly the First Amendment or its state counterpart, Article 16 as amended by Article 77 of the Amendments to the Massachusetts Constitution.[2]

Before I address your specific inquiry, though, I note that existing law may already accomplish the intended purpose of House 4476. House 4476 is identical in all essential respects to G.L. c. 56, § 41, which prohibits anonymous election-oriented posters or circulars.[3] The only substantive difference between section 41 and House 4476 is that section 41 prohibits anonymous circulars or posters

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[1] The bill reads, in pertinent part, as follows:

> No person shall write, print, post or distribute, or cause to be written, printed, posted or distributed, a circular or poster designed to aid or defeat any article on a Town Meeting Warrant unless there appears upon such circular or poster in a conspicuous place either the names of the chairman and secretary, or of two officers, of the political or other organization issuing the same or of some person eighteen years of age or older who is responsible therefor, with his name and residence, and the street and number, thereof, if any.
>
> Violation of this section shall be punished by imprisonment for not more than six months.

[2] The First Amendment, which by its terms applies only to laws enacted by Congress, is made applicable to the states by the Fourteenth Amendment. *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

[3] General Laws c. 56, § 41, reads as follows:

> No candidate for nomination or election to public office or any other person shall write, print, post or distribute, or cause to be written, printed, posted or distributed, a circular or poster designed to aid or defeat any candidate for nomination or election to any public office, or designed to aid or defeat any question submitted to the voters, unless there appears upon such circular or poster

"designed to aid or defeat *any candidate . . . or . . . any question submitted to the voters . . .*" (emphasis added), whereas House 4476 prohibits only such circulars or posters which are "designed to aid or defeat *any article on a Town Meeting Warrant . . .*" (emphasis added). Since articles on town meeting warrants concern "questions submitted to the voters," they appear to fall within the scope of G.L. c. 56, § 41. Therefore, House 4476 may not even be necessary.

For purposes of this opinion, however, I will assume that House 4476 would fill a gap in the coverage of G.L. c. 56, § 41. For the reasons discussed below, it is my opinion that in its current form the proposed law, while certainly defensible, would be vulnerable to a constitutional challenge on the ground that it abridges freedom of speech. Accordingly, the balance of this opinion sets forth the appropriate standards against which the bill will be measured and then provides some guidance concerning potential revisions of the bill.

It is relatively simple to articulate the framework within which state-imposed restrictions on speech are analyzed. First, the state must demonstrate a compelling interest in restraining those forms of speech which are constitutionally protected. *NAACP v. Alabama,* 357 U.S. 449, 463 (1958). Even assuming a compelling state interest, speech restrictions are unconstitutional unless they are no greater than is necessary to further that compelling intrerest. *Id.* at 463; *Procunier v. Martinez,* 416 U.S. 396, 413-14 (1974). Both the federal and state constitutions allow the government to regulate the time, place, and manner of speech to accommodate the state's compelling interests. Nevertheless, such time, place, and manner restrictions must be content neutral, leave open ample alternative channels of communication, and, must be narrowly tailored to serve the governmental interest advanced. *City Council v. Taxpayers for Vincent,* 466 U.S. 789, 808 (1984); *Opinion of the Justices,* 373 Mass. 888, 891 (1977).

House 4476 is content neutral. It applies to all issues raised by town meeting articles and therefore does not vest discretion in government officials to favor some ideas over others. Because House 4476 bans all anonymous literature relating to town meeting articles, however, the only alternative it offers is for the speaker to disclose his identity, which may not be a constitutionally acceptable option. *Talley v. California,* 362 U.S. 60, 64 (1960) (invalidating ordinance which prohibited all anonymous handbills). Even were this not a significant flaw, the expansive language of House 4476 would not only prohibit libel and false statements by anonymous authors, but true and useful information from anonymous sources as well. It may, therefore, not be as narrowly tailored as the Constitution requires.

Indeed, the Supreme Judicial Court has already cautioned that there is "significant authority that a disclosure requirement relating to election pamphlets cannot survive a First Amendment challenge." *Commonwealth v. Dennis,* 368 Mass. 92, 97-98 (1975). In *Dennis,* the court recognized the "significant First Amendment problems with any statute (like House 4476) which requires the author of

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> in a conspicuous place either the names of the chairman and secretary, or of two officers, of the political or other organization issuing the same, or of some person eighteen years of age or older who is responsible therefor, with his name and residence, and the street and number thereof, if any.
>
> Violation of this section shall be punished by imprisonment for not more than six months.

a publication to reveal his identity." *Id.* at 96. This statement is of particular significance to your request because it was made in the context of construing the former version of G.L. c. 56, § 41, the statute upon which House 4476 is apparently modeled.

In *Dennis*, the Supreme Judicial Court held the former version of section 41 unconstitutional on the narrow ground that its voter signature requirement imposed an unconstitutional prior restraint on non-voters' First Amendment rights. Section 41 formerly required disclosure of the identity of the political organization or individual voter responsible for election-oriented circulars or posters. After the *Dennis* decision, the Legislature amended section 41 by replacing the voter signature requirement with one designating instead "some person eighteen years of age or older" who is responsible therefor. St. 1976, c.137, § 2. The Massachusetts appellate courts have not had an opportunity to assess the constitutionality of the amended version of this statute, but their analysis would undoubtedly proceed from the premise that "constraints on the power of a State to limit freedom of expression must be carefully considered." *Dennis*, 368 Mass. at 99. The remainder of this opinion will elaborate on the specifics of these constraints to provide you with some guidance as to how House 4476 may be rewritten to avoid possible free speech problems.

As I have explained, the state must demonstrate a compelling interest in the subject of regulation to justify restrictions on speech. One simple method of improving House 4476 would be to identify such a compelling interest and perhaps couple that identification with legislative findings demonstrating the need for legislative action. In the absence of such findings I can only speculate as to the rationale for the measure, and I assume that the state interest supporting the bill's signature requirement would be to give voters all information necessary by which to evaluate election related literature. *Dennis*, 368 Mass. at 97. Although this interest may well be legitimate, the Supreme Judicial Court has ruled that it is not compelling enough to outweigh the competing interest in free speech. "It seems clear that any public interest in revealing the source of a communication so that the recipient may assess its content in light of that source does not furnish a constitutionally sufficient justification for a prohibition of all anonymous campaign literature." *Id.* at 97.

This conclusion follows from the seminal Supreme Court decision of *Talley v. California*, 362 U.S. 60 (1960), and is in accord with numerous subsequent state court decisions invalidating laws prohibiting anonymous campaign literature.[4]

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[4] *See, e.g., Schuster v. Imperial County Municipal Court*, 109 Cal. App. 3d 887, 167 Cal. Rptr. 447 (1980), *cert. denied* 450 U.S. 1042 (1981) (law prohibiting all anonymous political writings unconstitutionally overbroad because it stifled legitimate political dissent); *People v. Duryea*, 76 Misc. 2d 948, 351 N.Y.S. 2d 978, 992 (1974) (signature law invalid because it was "an absolute identification requirement designed to regulate pure speech involving political affairs"). *See also State v. Fulton*, 337 So. 2d 866 (La. 1979); *State v. N.D. Educ. Assoc.*, 262 N.W. 2d 731 (N.D. 1978); *People v. Bongiorni*, 205 Cal. App. 2d 856, 23 Cal. Rptr. 565 (1962) (all ruling blanket signature requirements overbroad).

In *Talley* the Supreme Court held that a California ordinance that prohibited the distribution of any handbill that did not identify its author and distributor was unconstitutionally overbroad because its identification requirement tended to "restrict freedom to distribute information and thereby freedom of expression."[5] *Id.* at 64. The principal justification for the *Talley* ordinance and similar measures like House 4476 is to promote honesty and fairness in the electoral process by deterring fraud, libel, and other harmful means of expression which may injure the integrity of that process.

Deterring fraud and protecting the integrity of the electoral process may well be compelling enough to satisfy the first prong of the test articulated above. *Cf. Buckley v. Valeo*, 424 U.S. 1, 26-29 (1975) (federal law limiting campaign contributions constitutionally served compelling state interest in preventing electoral corruption). Even so, House 4476 might still be vulnerable because it creates a blanket prohibition of all anonymous statements concerning local political issues, regardless of whether those statements are laudatory, truthful, responsible, or informative. The state's interest in helping the electorate to distinguish between truth and falsity and in deterring the dissemination of harmful or untruthful information "can be furthered through more narrowly constructed statutes without criminalizing the anonymous uttering of the truth." *Schuster*, 167 Cal. Rptr. at 452. Therefore, any revision of House 4476 should eliminate the blanket prohibition on anonymous material and distinguish between protected and unprotected speech.[6]

In conclusion, I emphasize that restrictions on speech are lawful only if they are precisely drawn. *First National Bank of Boston v. Attorney General*, 362 Mass. 570, 587 (1972). Narrowly tailored legislation which requires the author's name only on writings that are fraudulent, libelous, offensive or otherwise beyond the pale may avoid constitutional problems because it would advance the state interests discussed above in the least restrictive manner. *Talley*, 362 U.S. at 64-65. To bolster House 4476 against constitutional challenges, I recommend that it be drafted narrowly enough to prohibit false, fraudulent, or otherwise unprotected speech but otherwise allow the anonymous communication of ideas. *See Dennis*, 368 Mass at 97-99 *and cases cited.*

Very truly yours,
Francis X. Bellotti
Attorney General

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[5] The California ordinance reads as follows:

> No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:
> (a) The person who printed, wrote, compiled or manufactured the same.
> (b) The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon.

[6] I note that G.L. c. 56, § 42, prohibits making or publishing any false statement concerning a candidate or an issue submitted to the voters. This is the kind of narrow prohibition of unprotected speech that the First Amendment allows.

September 10, 1986

Honorable Michael Joseph Connolly
Secretary of State
State House - Room 337
Boston, Massachusetts 02109

Dear Secretary Connolly:

By letter dated August 7, 1986, you transmitted a series of proposed ballot questions to me and requested my opinion whether they are "public policy" questions within the meaning of G.L. c. 53, §19. You further requested an opinion of what simple, unequivocal and adequate form is best suited for presentation of these questions on the ballot.

As I have noted in the past, the term "public policy" as used in G.L. c. 53, §19, should not be given a restrictive meaning. 1982/83 Op. Atty. Gen. No. 3, A.G., Pub. Doc. No. 12 at 84. Each question must concern an important public matter in which every citizen of the Commonwealth would have an interest. 1984/85 Op. Atty. Gen. No. 2, A.G., Pub. Doc. No. 12 at ___; 1982/83 Op. Atty. Gen. No. 3, A.G. Pub. Doc. 12 at 84. Moreover, the instruction contained in each question must be consistent with the powers of the legislature, and the subject matter must be fit for legislative action. *Thompson v. Secretary of the Commonwealth,* 265 Mass. 16, 19 (1928); 1984/85 Op. Atty. Gen. No. 12, A.G. Pub. Doc. No. 12 at ___; 1982/83 Op. Atty. Gen. No. 3, A.G. Pub. Doc. No. 12 at 84. Unless the petition concerns a matter appropriately subject to some type of legislative action, it is not an appropriate public policy question. See, 1978/79 Op. Atty. Gen. No. 8, A.G. Pub. Doc. No. 12 at 114 (disapproving a petition asking the legislature to reject changes proposed by a local charter commission). See also, 1984/85 Op. Atty. Gen. No. 2, A.G. Pub. Doc. 12 at ___ (disapprov-Ing a petition asking the legislature to rescind licenses issued to particular companies for the storage and transportation of hazardous wastes).

Even when questions concern a small geographic area, if the problem is one of concern to the Commonwealth in general, then the question may be considered one of public policy. 1984/85 Op. Atty. Gen. No. 2, A.G. Pub. Doc. No. 12 at ___; 1980/81 Op. Atty. Gen. No. 6, A.G. Pub. Doc. No. 12 at 109; 1978/79 Op. Atty. Gen. Nos. 16, 17 and 18, A.G. Pub. Doc. No. 12 at 121-123.

As my prior opinions indicate, in ascertaining whether a question is one of "public policy", my review does not and cannot extend to a consideration of the constitutionality of any legislation that might eventually be enacted as a result of the voters' instruction. As a result, I express no opinion as to the validity of the measures that are contemplated by the questions that have been submitted. Cf, 1964/65 Op. Atty. Gen., Pub. Doc. No. 12 at 83.

Certain additional requirements must also be satisfied before the questions may appear on the ballot. The requirements to which I make reference are contained in G.L. c.53, §§19, 20 and 21 and involve a number of statutory prohibitions which involve questions of fact. For example, a question which is technically accurate and presents an important public issue may not appear on the ballot if the question is substantially the same as one which has been submitted to the voters within less than three years. G.L. c.53, §21. As Secretary of the Commonwealth, you have in your possession past election ballots from each of the relevant districts and, therefore, you are in a better position than I to make the factual determination required by statute.

Consequently, I have made no independent inquiry to determine whether these questions are statutorily defective for any reason other than a failure to qualify as a public policy question in proper form for presentation on the ballot. 1982/83 Op. Atty. Gen. No. 3, A.G. Pub. Doc. No. 12 at 84; See, 1958/59 Op. Atty. Gen. No. XII, A.G. Pub. Doc. No. 12 at 44.

With these considerations in mind, it is my opinion that the following questions are ones of public policy within the meaning of G.L. c.53, §19 and should appear on the ballot in the following form:

Representative Districts: 3rd Suffolk and Nine other Representative Districts [1]

Shall the Representative from this district be instructed to vote in favor of legislation forming the following wards and precincts of the City of Boston into a new city of the Commonwealth: ward 4, precincts 8 and 9; ward 8; ward 9; ward 10, precincts 5, 6, and 7; ward 11; ward 12; ward 13, precincts 1, 2, 3, and 5; ward 14; ward 15, precincts 1, 2, 3, 5 and 7; ward 17, precincts 1, 2, 3, 4, 5, 6, 7, and 10; ward 18, precincts 1, 2, 3, 4, 5, 6, and 21; ward 19, precinct 7?

Representative Districts: 9th, 10th and 11th Essex

Shall the Representative from this District be instructed to vote in favor of legislation requiring New England Telephone Company to keep Peabody, Salem, Danvers, Beverly, Marblehead and Lynn in the 617 area code?

Representative District: 8th Essex

Shall the Representative from this District be instructed to vote in favor of legislation requiring New England Telephone Company to keep Marblehead and Swampscott in the 617 area code?

Representative District: 4th Essex

Shall the Representative from this District be instructed to vote in favor of legislation requiring New England Telephone Company to keep Hamilton, Ipswich, Middleton, Topsfield, Wareham, Boxford and Essex in the 617 area code?

Senatorial District: 2nd Essex

Shall the Senator from this District be instructed to vote in favor of legislation requiring New England Telephone Company to keep Danvers, Beverly, Peabody and Salem in the 617 area code?

Representative District: 5th Essex

Shall the Representative from this District be instructed to vote in favor of legislation establishing a minimum annual increase in local aid for each city and town of at least 2½% of the city's or town's tax levy for the previous year?

Representative District: 5th Essex

Shall the Representative from this District be instructed to vote in favor of legislation requiring the Commonwealth to assume all costs of county courthouses and correctional institutions?

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[1] 5th, 6th, 7th, 9th, 12th, 13th, 14th, 15th, and 17th Suffolk.

Representative District: 5th Essex

Shall the Representative from this District be instructed to vote in favor of legislation requiring the state to assume at least 80% of all costs of special needs students that exceed the average state wide per-pupil cost?

Representative Districts: 3rd, 4th and 12th Worcester and 2nd Barnstable Senatorial District: Franklin, Hampshire

Shall the Representative/Senator from this District be instructed to vote in favor of a resolution calling upon the government of the United States to adopt a policy: (1) that would require the halt of nuclear bomb testing and the reduction of weapons by 1%, (2) that would challenge the Soviet Union to do likewise, with verification within one year; and (3) that would initiate mutual, verifiable, gradual reductions of nuclear weapons on a world-wide basis, with the goal of eliminating 99% of those weapons by the year 2000?

Representative Districts: 1st Plymouth and 2nd Franklin

Shall the Representative from this District be instructed to vote in favor of legislation prohibiting the dumping, disposal, storage or generation of radioactive waste in Massachusetts from commercial nuclear plants after July 4, 1989?

Very truly yours,
Francis X. Bellotti
Attorney General

September 18, 1986

Barbara Neuman, Executive Director
Board of Registration in Medicine
Department of Civil Service and Registration
Executive Office of Consumer Affairs and Business Regulation
Ten West Street
Boston, MA 02111

Dear Ms. Neuman:

You have requested my opinion whether the Fair Information Practices Act ("FIPA"), G.L. c. 66A, §§ 1 *et seq.* (1984 ed.) requires the Board of Registration in Medicine (the "Board") to keep confidential the dates of birth of the Board's licensees and license-applicants.

I am informed that your opinion request arose because the Board wishes to participate more effectively in various local and national data reporting systems which provide information on physicians. Apparently these systems are the Board's primary source of information about previous disciplinary action taken against physicians who have moved from state to state. You indicate that the efficient use of these systems required the Board to submit both the physician's name and date of birth to each system. The question is significant because in 1977 I opined that among the items of personal information obtained by the boards of registration in connection with their licensing processes, the age of an individual was not a public record and was restricted from disclosure by Section 2(c) of FIPA. 1976/77 Op. Att'y Gen. No. 32, Rep. A.G., Pub. Doc. No. 12 at 157 (1977). You question whether intervening statutory changes and judicial decisions now permit the disclosure of ages and dates of birth by the boards of registration.

The brief answer to your question is that there have been significant changes in the law that lead me to conclude that after October 1, 1986, FIPA will not prohibit the Board from releasing the dates of birth of its licensees and license-applicants to national data reporting systems which provide information on individual physicians so long as birth dates are helpful in utilizing these systems effectively.

The first of the changes occurred shortly after the issuance of my 1977 opinion. In October of that year, the Governor signed Chapter 691, emergency legislation amending both FIPA[1] and the Public Records Law.[2] The stated purpose of Chapter 691 was "to prevent potential conflicts between the demands of individual rights of privacy and the need to make certain information available to the public." These amendments to FIPA and the Public Records Law act together to broaden the range of information that is available as public records and to reduce the scope of data that are "personal data" covered by FIPA. *Torres v. Attorney General*, 391, Mass. 1, 7 (1984).

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[1] FIPA was amended by §§ 6 - 13 of Chapter 691, which, *inter alia*, changed the definition of "personal data" to exclude all information contained in a public record. *See* St. 1977, c. 691, § 6.

[2] The Public Records Law was amended by § 1 of Chapter 691, which added the word "unwarranted" to subclause (c) of G.L. c. 4, § 7 (twenty-sixth), thereby excluding from the definition of "public records" those "materials or data relating

Coming so quickly after issuance of my 1977 opinion, these amendments can be viewed as a legislative response to my articulation of the prior law, permitting a reassessment of that opinion. More recent developments may also serve to warrant an extensive reconsideration.[3]

Engaging in that reassessment is unnecessary in the present context, however, because a very recent statute has resolved the specific problem which prompted your inquiry. On July 23, 1986, after you transmitted your opinion request, the Governor signed St. 1986, c. 351, an omnibus medical malpractice reform bill, which contains the following pertinent section:

> The Board shall participate in any national data reporting system which provides information on individual physicians. St. 1986, c. 351, § 12.

This provision will become part of G.L. c. 112, § 2, and takes effect on October 1, 1986. St. 1986, c. 351, § 41. In my opinion, this provision authorizes the Board to disclose the dates of birth of its licensees and license-applicants to any national data system which provides information on individual physicians if the use of birth dates is an element of that data collection system.

The provision of FIPA which restricts an agency from releasing "personal data" is Section 2(c). It states, in pertinent part, that a state agency shall

> not allow any other agency or individual not employed by the holder to have access to personal data *unless such access is authorized by statute* or regulations which are consistent with the purposes of this chapter [G.L. c. 66A] or is approved by the data subject . . . (emphasis added).

It is my view that St. 1986, c. 351, § 12, is a statute that authorizes the Board to allow national systems which report information on physicians to have access to the dates of birth of the Board's licensees and license-applicants if dates of birth enable the data reporting system to identify physicians. Such disclosures are, therefore, not prohibited by FIPA.

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to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy." *See* G.L. c. 4, § 7 (twenty-sixth) (c) 1984 ed.).

[3] In a recent decision in which the Supreme Judicial Court held that the home addresses of Braintree's public school employees were public records, the court noted that the school system employees' home addresses were "available from other public sources" including "street lists" of all persons residing in the Commonwealth prepared by local officials each year pursuant to G.L. c. 51, §§ 4, 6, 7 (1984 ed.). *Pottle v. School Committee of Braintree*, 395 Mass. 861, 866 (1985). I am not unmindful of the fact that these "street lists" are required to indicate each person's date of birth as well. G.L. c. 51, §§ 6, 7.

It is noteworthy that this statute requires the Board to participate in "national" data reporting systems. I understand that the "local" organizations from which you seek information about physicians are law enforcement agencies which have access to various national criminal justice data systems. Disclosures of physicians' dates of birth to these local law enforcement agencies is authorized by St. 1986, c. 351, § 12, so long as dates of birth are helpful in identifying individual physicians listed in these national data reporting systems.

If there are purely "local" data reporting systems which provide information on physicians, § 2(c) of FIPA may prohibit the Board from providing them with physicians' dates of birth. St. 1986, c. 351, § 12 does not appear to authorize such disclosures. But you have not indicated that such local data reporting systems exist or, if they do, whether you need physicians' birth dates to utilize them efficiently. Thus, I consider it to be a hypothetical question whether disclosure of physicians' birth dates to local data reporting systems violates § 2(c) of FIPA. Accordingly, because it has been long-established policy of the Attorney General to refuse to give opinions on hypothetical questions (*see, e.g.*, 1977/78 Op. Att'y Gen. No. 18, Rep. A.G., Pub. Doc. No. 12 at 116 (1978)), I decline to address this question.

I also decline to address the more general question raised in your letter, i.e., whether certain changes in the public records law, noted above, and the decision in *Pottle v. School Committee of Braintree, supra,* now lead me to the view, contrary to that in my 1977 opinion, that dates of birth of the Board's licensees and license-applicants constitute public records. I view this question to be one best answered, in the first instance, by the Supervisor of Public Records. It is the policy of the Attorney General to decline to render an opinion when the question raised by the request is committed by statute to another officer of the Commonwealth. The determination whether information being held by public agencies constitute public records subject to mandatory disclosure under G.L. c. 66, § 10 (1984 ed.) is committed by statute to the Supervisor of Public Records. *See* G.L. c. 66, § 10(b) (1984) ed.). *See also* G.L. c. 66, §§ 1, 4 (1984 ed.).

In sum, it is my opinion that after October 1, 1986, FIPA will not prohibit the Board from releasing the dates of birth of its licensees and license-applicants to national data reporting systems which provide information on individual physicians so long as it is helpful to use birth dates, along with physicians' names, as an identifier to maximize the accuracy or quantity of the information obtained or the speed with which it can be retrieved.

Very truly yours,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

October 31, 1986

Charles V. Barry, Secretary
Executive Office of Public Safety
One Ashburton Place - 21st Floor
Boston, Massachusetts 02108

Dear Secretary Barry:

You have asked my opinion on whether the implementation of the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 455, will preempt[1] enforcement of G.L. c. 269, § 10, (1984 ed.), the Commonwealth's Bartley/Fox gun law. Specifically, your concern is with Section 107 of the Act, which amended Title 18 of the United States Code by adding a new section 926A.[2] Before I could address your inquiry though, Congress superseded even this new statute with the enactment of the Interstate Transportation of Firearms Act, Pub. L. No. 99-360, 100 Stat. 766 (1986). This latter Act was adopted to technically refine the Firearms Owners' Protection Act. Among its refinements was a provision modifying new section 926A so that it expressly sanctions interstate transportation of firearms.

As modified, 18 U.S.C. S 926A provides:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully, possess and carry such firearms, if during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

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[1] I do not ordinarily issue opinions dealing with the question of federal preemption of state law. Under the state constitution no member of the executive branch of state government can suspend the operation of a law; that is exclusively the prerogative of the General Court, Mass. Const. pt.1, art. 20. Here I opine not that the state law is preempted by the federal law, but that the federal law provides a defense to state prosecution.

[2] As inserted by the Firearms Owners' Protection Act, Pub. L. 99-308, 100 Stat. 455 (1986), 18 U.S.C. § 926A provided:

> Any person not prohibited by this chapter from the transporting, shipping, or receiving a firearm shall be entitled to transport an unloaded, not readily accessible firearm in interstate commerce notwithstanding any provision of any legislation enacted, or any rule or regulation prescribed by any State or political subdivision thereof.

For the reasons set forth below, I conclude that as a result of these new federal laws, a non-resident in lawful possession of a handgun is exempt from the licensing requirements imposed by the Commonwealth while he is transporting that weapon and that he has a defense to prosecution for failure to possess a Massachusetts license, provided, that the handgun is unloaded and inaccessible throughout his travels in Massachusetts. In all other situations, however, I conclude that the laws of this Commonwealth are unaffected by these federal enactments. I begin my analysis with an overview of the state statutory scheme.

In Massachusetts, to lawfully carry a firearm a person must obtain a license to do so issued pursuant to G.L. c. 140, § 131 (1984 ed.), or be exempt from the requirement. The non-resident who may wish for some reason to carry a firearm while traveling through the Commonwealth must either obtain a temporary license to do so, pursuant to G.L. c. 140, § 131F (1984 ed.), or be allowed by the provisions of G.L. c. 140, § 131(G) (1984 ed.), to carry a pistol or revolver without a license for the purpose of taking part in competition, or attending a meeting or exhibition of collectors or for the purpose of hunting. These exceptions are subject to the further qualification that the non-resident be licensed in another state and, in the case of the hunter, he also must have a valid hunting license issued by the Commonwealth or the state of his destination. Except in these limited instances, an individual found with a firearm in his possession or in his control in a vehicle, may be prosecuted under the provisions of G.L. c. 269, § 10(a).

While the provisions noted above regulate the "carrying" of a firearm, a qualified individual may lawfully own or possess a firearm in Massachusetts, if he holds a firearm identification card under G.L. c. 140, § 129B (1984 ed.), or is otherwise exempt from the requirement. *Commonwealth v. Morse*, 12 Mass. App. Ct. 426, 428 (1981). Possession is also required by the immediately following sections of chapter 140.

Currently, G.L. c. 140, § 129C (1984 ed.) provides: "No person, other than . . . one who has been issued a license to carry a pistol or revolver or an exempt person as herein described, shall own or possess any firearm, rifle, shotgun or ammunition unless he has been issued a firearm identification card . . ." An individual in possession of a firearm without such a card may be prosecuted under the provisions of G.L. c. 269, § 10(h). The exemptions noted make S 129C inapplicable to "[p]ossession of rifles and shotguns and ammunition therefor by non-residents traveling in or through the Commonwealth, provided that any rifles or shotguns are unloaded and enclosed in a case." G.L. c. 269, § 129C(h). Similar exemptions for rifles and shotguns are provided for non-resident hunters, § 129C(f), and non-residents engaged on a firing or shooting range, § 129C(g).

While Massachusetts has provided for non-residents transporting rifles and shotguns, corresponding provisions for non-residents transporting handguns have not been adopted by the General Court. Under Massachusetts law those individuals must either be licensed to carry a handgun as noted earlier in this opinion or fall within one of the following narrowly drawn exemptions: a federally licensed manufacturer, § 129C(b); a common carrier transporting firearms in the course of regular and ordinary business, § 129C(d); a person voluntarily surrendering a firearm with prior written notice given, § 129C(c); a new resident of the Commonwealth who has been here less than sixty days, § 129C(j); a participant in a trial where a handgun is an exhibit, § 129C(m); an heir or legatee who gained possession of a handgun within the previous one hundred and eighty days, § 129C(n); or a person in the military or other service. § 129C(o).

To understand the effect the new federal law will have on the Commonwealth's statutory scheme, it is important to look first at the articulated purpose of the

federal legislation which amends the Gun Control Act of 1968, codified in Chapter 44 of Title 18 of the United States Code. The articulated purpose is dual: first, to strengthen the provisions regulating the unlawful sale, possession or taking receipt of firearms and ammunition, and second, to protect the interests of legitimate sportsmen. In furtherance of the latter purpose, Congress sought to ensure that legitimate sportsmen could travel freely from state to state without running afoul of any state or local licensing laws or regulations.[3]

The allowance for interstate transportation of firearms created by Congress is not without limits. By its plain words the federal legislation is limited to firearms that are unloaded and inaccessible. Therefore, those provisions of state law which regulate the carrying of a firearm either on the person, or within his control in a vehicle, are unaffected.

Moreover, the federal legislation does not affect the ability of the Commonwealth to regulate its own residents. Any individual utilizing the federal provision must, by the terms of section 926A, comply with the laws of his state of origin as well as the laws of the state at his trip's end. Thus, the Massachusetts resident leaving the state, returning, or traveling within its borders, must comply with all state regulations.[4]

Where the federal legislation will affect the enforcement of Massachusetts gun control efforts is in the limited area of the transportation of handguns by non-residents. As I interpret the new federal provision, it creates one further exemption to the licensing requirement imposed by G.L. c. 140, § 129(c), similar to the exemption already provided to those transporting rifles, for the non-resident in "lawful possession" of a handgun, unloaded and inaccessible who travels in or through the Commonwealth. As noted earlier, lawful possession means the traveler must comply with the laws of his state of origin as well as the laws of the jurisdiction at his trip's end. *See, e.g.*, 132 Cong. Rec. H4103 (daily ed. June 24, 1986) (statement of Rep. Marlenee).

Any traveler who complies with these requirements of section 926A has a *defense* to any prosecution under the provision of G.L. c. 269, § 10(h).

I stress the phrase "defense" in the preceding sentence because I stated at the outset that the federal law does not preempt the state law in this case, rather it creates a defense to state prosecution. This approach also finds direct support in the legislative history. One of the two sponsors of the original § 926A said of his bill:

> The purpose of this amendment is to make it clear that it is the intention of Congress that state and local statutes and regulations shall remain in effect, except in certain narrow circumstances involving travel through one or more states other than the state of residence, a defense is available to prosecutions under State and

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[3] Massachusetts was often cited during consideration of these bills as one of the states with local laws that are oppressive to the legitimate sportsmen. *See e.g.*, 132 Cong. Rec. S9116 (daily ed. July 9, 1985) (statement of Senator Hatch).

[4] Senator Kennedy, in his remarks on the Firearms Owners' Protection Act, Pub L. No. 99-308, 100 Stat. 455 (1986), is most explicit on this point:

> In addition, Mr. President, the Senate language makes it clear that a state or locality's right to regulate the carrying of firearms by its residents is not affected in any way of the provisions of this Bill. 132 Cong. Rec. S5367 (daily ed. May 6, 1986) (statement of Senator Kennedy).

> local gun control laws. The circumstances under which a defense would be created under this amendment are limited . . . 131 Cong. Rec. S9117 (daily ed. July 9, 1985) (statement of Sen. Metzenbaum).

In conclusion, I emphasize that the new federal provision does not affect the Commonwealth's right to regulate its own residents and to prosecute those who do not comply with our statutory requirements. Nor does it prevent the Commonwealth from prosecuting those non-residents found carrying a firearm either on their person or within their control in a vehicle without proper state authority. It does, however, entitle the non-resident who can own and legally transport firearms under the laws of his jurisdiction to transport an unloaded and inaccessible firearm through the Commonwealth, and provides him a defense against prosecution by the Commonwealth for certain violations of our gun control law.

Very truly yours,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

November 7, 1986

The Honorable L. Scott Harshbarger
District Attorney for Middlesex County
Thorndike Street
Cambridge, MA 02141

Dear District Attorney Harshbarger:

You have requested my opinion on two issues presented by G.L. 94C, § 47 (1984 ed.), the drug forfeiture statute. You ask first, whether it permits a municipal police chief, rather than the city or town treasurer, to establish and manage a "law enforcement trust fund" created by that statute and second, whether the police department can use the trust funds without first obtaining an appropriation from the municipal appropriating body. As background for inquiry, you have informed me that you and the local police chiefs are uncertain about the procedure under the statute for distributing and handling the drug forfeiture funds recovered pursuant to the statute.[1]

For the reasons set forth below, it is my opinion that the drug forfeiture statute does not authorize police chiefs to establish and manage the law enforcement trust fund. Rather, it is the duty of the city or town treasurer to perform this task. I also conclude that the drug forfeiture statute authorizes police departments to use the trust funds without first obtaining an appropriation from the municipal appropriating body.

Your request turns on the terms of two arguably conflicting laws. The first of those statutory provisions is § 47(d) of G.L. c. 94C, the drug forfeiture statute, which provides in pertinent part:

> . . . Said proceeds once acquired shall be distributed equally between the prosecuting district attorney or attorney general and the city, town, state or metropolitan district police department . . . . All such funds shall be deposited in a special law enforcement trust fund and shall be expended to defray the costs of protracted investigations, to provide additional technical equipment or expertise, to provide matching funds to obtain federal grants or for such other law enforcement purposes as the chief of police of such city or town, the commissioner of public safety or the superintendent of the metropolitan district police deems appropriate, but such funds shall not be considered a source of revenue to meet the operating needs of such department.
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> G.L. c. 94C § 47(d); St. 1984, c. 486, § 2.

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[1] I recognize that I do not have the authority to issue opinions to local police chiefs and, therefore, the views expressed in this opinion are not binding on them or the municipal treasurers. I offer this advice under G.L. c. 12, § 6 to assist you in carrying out your duties under G.L. c. 94C, § 47 which include bringing the forfeiture petition on behalf of the municipality and obtaining the final court order disposing of the moneys in accordance with the law.

Section 47(d) on its face requires that the drug forfeiture funds be distributed to the city or town police department and deposited in a special law enforcement trust fund.[2] While nothing in this language would seem to preclude seized money from going directly to the police department or the chief from setting up the fund, the provision of the drug forfeiture statute must be read together with the municipal finance statutes, G.L. c. 44, §§ 1 *et seq* (1984 ed.). Section 53 of chapter 44 requires that, "All moneys received by any city, town or district officer or department, except as provided by special acts and except fees provided for by statute, shall be paid by such officer or department upon their receipt into the city, town, or district treasury." Therefore, unless the money received by a municipal officer or deparment is within the two exceptions listed, it must be paid into the municipal treasury. These exceptions do not apply to drug forfeiture proceeds. Although § 47(d) grants the police department the power to determine the purpose for which proceeds from the law enforcement trust fund may be spent, it does not specifically assign to the police department the responsibility of setting up the trust fund or acting as custodian of the trust fund.[3] This omission in § 47(d) leads me to conclude that the Legislature intended that the provisions of municipal finance laws generally apply and, therefore, that the municipal treasurers, not the police chiefs, be the custodians of the trust funds. *See* G.L. c. 41, § 35. The treasurer must, of course, treat the funds as restricted receipts and disburse them in accordance with the terms of the statute. Such a construction gives reasonable effect to both the drug forfeiture law and and the municipal finance law and allows the two laws to be read harmoniously. *See Boston v. Board of Education*, 392 Mass. 788, 792 (1984) (where two statutes are alleged to be inconsistent, they are construed in a manner which gives reasonable effect to both statutes and creates a consistent body of law); *see also Casey v. Massachusetts Electric Co.*, 392 Mass 876, 881 (1984).

Your second inquiry also turns on the terms of arguably conflicting provisions of the drug forfeiture and municipal finance laws. Section 53 of G.L. c. 44 provides in pertinent part: "Any sums so paid into the city, town or district treasury shall not later be used by such officer or department without specific appropriation thereof. . . ."[4] At apparent odds with this statutory position is the drug forfeiture statute, which provides that the funds "shall be expended for specific

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[2] Prior to the enactment of the 1984 amendment creating the law enforcement trust funds, § 47(d) required that money recovered by the police under the drug forfeiture statute be deposited directly into the state treasury rather than distributed to the municipality. St. 1971, c. 1071, § 1.

[3] I note that even when municipalities establish a board of commissioners of trust funds to oversee more typical trust funds, the treasurer acts as custodian of the funds. G.L. c. 41, § 46. The duties of a trust fund custodian include investing and reinvesting "all funds and securities of such trust funds" and expending such funds as directed. *Id.*

[4] The finance statutes provide for two exceptions to this requirement, but neither exception is applicable in this case.

law enforcement purposes[5] . . . or for other such law enforcement as the chief of police of such city or town . . . deems appropriate . . . but such funds shall not be considered a source of revenue to meet the operating needs of such department." G.L. c. 94C, § 47(d). This language strongly suggests that the General Court intended that the police department is not required to seek the approval of any appropriating body when requesting proceeds from the trust fund pursuant to G.L. c. 94C, § 47(d).

The intent of the Legislature in enacting a statute is discerned from the ordinary meaning of the words in the statute considered in context of the objective which the law seeks to fulfill. *International Organization of Masters, Mates and Pilots, Atlantic Gulf Maritime Region, AFL-CIO v. Woods Hole, Martha's Vineyard and Nantucket S.S. Authority*, 392 Mass. 811, 813, (1984). From the plain language of the drug forfeiture statute, it is evident that the Legislature intended that the police chiefs decide how the law enforcement trust funds should be spent. Not only can the police chief expend funds as he "deems appropriate," but the money cannot be used to meet the normal operating needs of the department. Interpreting § 47(d) to require an appropriation before police departments could use those funds would be inconsistent with the language and the objective of § 47(d).[6] I recognize that this interpretation puts G.L. c. 94C, § 47(d) squarely at odds with G.L. c. 44, § 53. In my opinion, the specific expenditure requirements of § 47(d) control. Under well-established rules of statutory construction, if a general statute and a specific statute cannot be reconciled, the general statute must yield to the specific statute. *Pereira v. New England LNG Co., Inc.*, 364 Mass. 109, 118 (1973).

The Legislature's intent not to require an appropriation is further evidenced by a statutory enactment during the same session as the amendment to the drug forfeiture law. In § 85 of St. 1984, c. 234, the Legislature acknowledged that funds received by a state agency pursuant to the drug forfeiture statute[7] may be expended without further appropriation.[8] I conclude, therefore, that the police chiefs are not required to obtain an appropriation before using the trust funds.

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[5] The funds be used to "defray the costs of the protracted investigations, to provide additional technical equipment or expertise, to provide matching funds to obtain federal grants. . .".

[6] Appropriating is more than an act setting aside money. It also involves devoting that money to a specific purpose and no other. *Slama v. Attorney General*, 384 Mass. 620, 625 (1981).

[7] Under G.L. c. 94C, s 47(d) drug forfeiture funds may be distributed to the State Police and the Metropolitan District Police.

[8] Section 85 provides: "Notwithstanding any general or special law to the contrary, any state agency or office which is authorized in any section of this act or in section forty-seven of chapter ninety-four C of the General Laws, to expend certain revenues without further appropriation shall file within thirty days after the end of each quarter with the house and senate committees on way and means and the commissioner of administration a report detailing the source and amount of all such revenues and the purpose and amount of all expenditures therefrom."

My conclusion is further supported by a recent opinion in which the Supreme Judicial Court authorized a similar exception to the appropriation requirement in an advisory opinion involving the state treasury. *Opinion of the Justices*, 393 Mass. 1209 (1984). *See also Opinion of the Justices*, 375 Mass. 851, 854 (1978). At issue before the Court was whether revenues received according to the provisions set out in the bill establishing the Massachusetts Development Bank, House No. 6140, would be subject to the requirements of Article 63, § 1, the amendment to the state constitution establishing the process by which state revenues are received and disbursed.[9] The Court decided that under certain conditions, a trust fund may be exempt from the regular appropriations process described in Article 63. According to the Court, "Funds received by the Commonwealth and held in trust, to be disbursed only in compliance with legislatively prescribed conditions are not subject to Art. 63 even though they are received 'on account of the Commonwealth' and the State Treasurer is named as custodian of the fund." *Opinion of the Justices*, 393 Mass. at 1222. Trust funds meeting the above-quoted conditions are exempt from the provisions of Article 63 because the purpose behind Article 63, to centralize state funds and to insure careful consideration of their expenditure, *id.*, is not applicable to funds which already have a designated purpose.

This exception to the state appropriations process authorized by the Supreme Judicial Court parallels the implicit exception to the municipal appropriations process created by the drug forfeiture statute. The characteristics of the law enforcement trust fund described by the drug forfeiture statute directly correspond to the conditions imposed on trust funds for exemption from the state appropriations process. Similar to the condition that income from a trust fund must ultimately benefit the Commonwealth to be exempt from Article 63, the law enforcement trust fund, though intended to benefit the police department directly, is intended to benefit the municipality served by the police department through its provision that trust fund income must be expended for investigative work. G.L. 94c, § 47(d). The second condition imposed by the Court, that the money be held in trust, is met by the plain language of the statute: "All such funds shall be deposited in a special law enforcement trust fund . . . ." *Id.* The third condition imposed for exemption from the state appropriations process requires that the income from the trust fund in question "be disbursed only in compliance with legislatively prescribed conditions . . . ." *Id.* at 1222. Although the Legislature allows the police chief to determine the purpose for which income from the law enforcement trust fund may be spent, it has delineated very specific boundaries for such decisions. For example, the Legislature requires that the income be spent for a purpose related to law enforcement but not for use in meeting the department's operating needs. Illustrations of appropriate law enforcement expenditures are also provided in the statute. *Id.* The authorization by the Massachusetts Supreme Judicial Court of an exemption for certain trust funds from the state appropriations process, which is directly analogous to the exemption from the municipal appropriations process implied by the drug forfeiture statute with regard to law enforcement trust funds, confirms the validity of the procedure intended by the Legislature. *See Baxter v. Minter*, 378 F. Supp. 1213 (D. Mass. 1974) (reference to the interpretation given analogous statutory provisions is an accepted method of statutory construction).

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[9] Massachusetts Const. amend. at. 63, § 1 provides: "[A]ll money received on account of the Commonwealth from any source whatsoever shall be paid into the treasury of the Commonwealth."

In summary, I am of the opinion that, in promulgating the drug forfeiture statute, G.L. c. 94C, § 47(d), the Legislature did not authorize the police department to act as the custodian of the law enforcement trust fund. The Legislature did, however, authorize the police department to receive proceeds from the law enforcement trust fund directly from the municipal treasurer without the requirement of a specific appropriation from the municipal appropriating body.

Very truly yours,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

January 6, 1987

Paula Gold
Secretary
Executive Office of Consumer Affairs
and Business Regulation
One Ashburton Place
Boston, MA 02108

Dear Secretary Gold:

You have requested that I advise you, pursuant to G.L. c. 12, § 9 (1984 ed.), whether the Commissioner of Insurance (Commissioner) has the authority to promulgate a regulation that would prohibit insurers from classifying individuals on the basis of sex with respect to the terms, conditions, rates, benefits or requirements in any insurance contract. Based on the analysis set forth below I conclude that the Commissioner has such authority.

My analysis begins with the statutory language that sets forth the Commissioner's general power under G.L. c. 175 (1984 ed.). Chapter 175 governs the licensing, rates, coverage and financial stability of companies which sell most types of insurance in the Commonwealth. Section 3A of chapter 175 states: "[t]he Commissioner shall administer and enforce the provisions of this chapter . . . ." Although this general statement of the Commissioner's authority does not include a specific grant of rulemaking authority, it is my opinion that the power of the Commissioner to "administer and enforce" the provisions of the general laws relating to insurance necessarily includes the power to issue regulations.

An express grant of broad authority like the one contained in section 3A, "carries with it by implication all incidental authority required for the full and efficient exercise of the power conferred." *New England Medical Center v. Rate Setting Commission*, 384 Mass. 46, 53 (1981) *quoting Scanell v. State Ballot Law Commission*, 324 Mass. 494, 501 (1949). It is well established that the Legislature need not "specify, definitely and precisely, each and every ancillary act that may be involved in the discharge of an official duty." For example, in *Clerk of Superior Court for Court of Middlesex v. Treasurer & Receiver General*, 386 Mass. 517, 522 (1982), the Court upheld not only that authority specifically granted to the Chief Administrative Justice by statute, "but also the authority to employ all ordinary means reasonably necessary for the full exercise of the powers granted to him and the duties imposed on him." *Id.* Moreover, in determining the full extent of the Commissioner's authority under chapter 175, it is appropriate to look to that statute in its entirety. His authority "need not necessarily be traced to specific words" in the statute. *Levy v. Board of Registration and Discipline in Medicine*, 378 Mass. 519, 524 (1979), *quoting Commonwealth v. Cerveny*, 373 Mass. 345, 354 (1977).

An examination of chapter 175 reveals that the Legislature had given the Commissioner the authority to perform the complex task of regulating numerous aspects of the insurance industry. His powers and duties include, among other things, establishing certain rates, approving the form and content of various policies, and reviewing the financial condition of companies. The Commissioner has, in my view, the type of broad authority to act in the public interest on complex matters of insurance that warrants construing the enabling statute to grant general rulemaking authority.

My conclusion is supported by decisions which hold that broad, substantive rulemaking authority may be granted by the Legislature through language con-

taining a general delegation of administrative authority. *See, e.g., Bureau of Old Age Assistance of Natick v. Commissioner of Public Welfare*, 326 Mass. 121 (1950). In *Bureau of Old Age Assistance of Natick*, the Supreme Judicial Court found that substantive rulemaking authority had been conferred upon the Commissioner of Public Welfare in "the broad and general power conferred upon the department to *supervise and administer* [the] system of relief." 326 Mass. at 24 (emphasis added). A similar broad grant of rulemaking authority can be found in the legislative mandate in G.L. c. 175, § 3A, that the Commissioner of Insurance "administer and enforce" the insurance laws.

It is also my opinion that the narrow and explicit grants of rulemaking authority contained in Chapter 175[1] do not modify the implicit, general grant of rulemaking authority in G.L. c. 175, § 3A. *See, e.g., Grocery Manufacturers of America v. Department of Public Health*, 379 Mass. 70, 76 (1979) (a grant of specific rulemaking power in the Department of Public Health's enabling statute should not limit its general rulemaking authority to deal with other matters). *See also The Equine Practitioners Association, Inc. v. The New York State Racing and Wagering Board*, 105 A.D.2d 215, 483 N.Y.S.2d 239 (App. Div. 1984) (regulations regarding the administration of drugs to race horses upheld under the Racing Board's general jurisdictional authority over horse racing activities, notwithstanding the Racing Board's specific grant of authority to promulgate regulations in other areas of horse racing).

In your letter requesting this opinion you have specifically referred to possible statutory impediments to the Commissioner's authority to promulgate a regulation prohibiting sex discriminatory insurance policies. The possible statutory limitations you identified are the provisions of G.L. c. 175, §§ 9, 144 and 146 (1984 ed.), which deal with the mortality tables used by insurers, and G.L. c. 176D, § 3(7) (1984 ed.) which defines "unfair discrimination".

I find that there is no inherent conflict between the type of regulation the Commissioner seeks to promulgate and G.L. c. 175, §§ 9, 144 and 146. These sections require insurance companies to use specified mortality tables in determining cash surrender values and nonforfeiture benefits for life insurance annuity policies. These mortality tables provide separate and different mortality rates for men and women. Nothing in the language of G.L. c. 175, § 9, § 144 or § 146 requires that men and women be treated differently. Insurers currently are free to use mortality factors for one sex in calculating rates and benefits for both men and women. Indeed, acting pursuant to c. 175, § 144(6A) (h) (6) the Commissioner has already approved "blended" mortality tables for use in implementing the United States Supreme Court's decision in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983). These tables present a nonsex-specific set of mortality factors which are intended to be used in calculating rates and benefits for insurance policies held by both men and women. This sex neutral mortality table regulation, as promulgated at 211 C.M.R. § 32.00, states that the blended tables

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[1] *See, e.g.*, G.L. c. 175, § 2A (1984 ed.) (Commissioner to designate test of "readability analysis"); c. 175, § 108 (1984 ed.) (Commissioner may issue regulations concerning submission of individual health insurance policies for approval. "The provision shall not abridge any other authority granted the Commissioner by law."); c. 175, § 110E (1984 ed.) (Commissioner may issue regulations governing fair disclosure and form and content of health insurance policies); c. 175, § 144 (1984 ed.) (Commissioner by regulation may approve mortality tables adopted after 1980 by the National Association of Insurance Commissioners).

may, at the option of the company, be substituted for the sex segregated tables specified in G.L. c. 175, §§ 9 and 144.[2] 211 C.M.R. § 32.05. The regulation also clearly permits the use of these blended tables in pricing policies which are not covered by *Norris*. I conclude that these sections do not limit the Commissioner's authority to promulgate a regulation which would prohibit insurers from discriminating on the basis of sex in the terms, conditions, rates, benefits or requirements under any insurance policy.

Your inquiry also refers to G.L. c. 176D, § 3(7). Section 3(7) prohibits unfair discrimination which is defined as "making or permitting any unfair discrimination between individuals of the same class and equal expectation of life." Nothing in chapter 176D can be read as a statutory mandate for gender based premiums and benefits or as limiting the Commissioner's authority to promulgate a regulation prohibiting such sex-based terms in insurance policies under c. 175, S 3A.[3]

In summary, the Commissioner of Insurance has the legal authority to promulgate a regulation that would prohibit insurers from classifying individuals on the basis of sex with respect to the terms, conditions, rates, benefits or requirements in any insurance policy.

Very truly yours,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

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[2] This regulation permits insurers to comply with *Norris* by applying the mortality factors for one sex in calculating the rates and benefits for policies held by both men and women.

[3] You suggest Chapter 176D as a possible source of the Commissioner's rulemaking authority. It is not necessary to determine whether the Commissioner has the authority under this section to promulgate a regulation eliminating discrimination in the rate, terms, and benefits in any insurance contract, since I have already concluded that the Commissioner has such authority under G.L. c. 175, § 3A.

January 14, 1987

William D. Delahunt
District Attorney
Norfolk District
P.O. Box 309
360 Washington Street
Dedham, Massachusetts 02026

Dear District Attorney Delahunt:

You have requested my opinion, pursuant to G.L. c. 12, § 6, regarding the authority of a police chief to issue a license to carry or possess a firearm to a member of his police department who resides in another community. You cite G.L. c. 140, § 131, which authorizes a chief of police to issue a firearm license to certain persons "residing or having a place of business" within his jurisdiction. Your specific question is whether a person who is employed in a community as a police officer has a "place of business" there within the meaning of the statute.[1]

I do not believe it is necessary to determine whether a police officer has a place of business in the community by which he is employed in order to respond to your general question. General Laws c. 41, § 98 provides that police officers of all cities and towns "may carry within the commonwealth such weapons as the chief of police or the board or officer having control of the police in a city or town shall determine." In effect, G.L. c. 41, § 98 exempts police officers from compliance with the licensing requirement of G.L. c. 140, § 131. Police officers are not required to comply with the licensing requirement of G.L. c. 140, § 131, because G.L. c. 41, § 98 entitles them to carry "within the commonwealth" any weapons deemed appropriate by their chiefs of police. *See City of Boston v. Boston Police Patrolmen's Association, Inc.*, 8 Mass. App. Ct. 220, 226 (1979) (G.L. c. 41, § 98 gives police commissioner broad discretion in promulgating orders on the subject of firearms); *see also* 1959 Op. Att'y Gen., Rep. A.G., Pub. Doc. No. 12 at 77 (1959) (G.L. c. 41, § 98 means that police officers need not be licensed under G.L. c. 140, § 131 to carry a weapon, even when off duty).

In my opinion, however, G.L. c. 41, § 98 does not authorize a chief of police to permit a police officer not under his command to carry weapons. The authority given by S 98 is conferred upon "the" chief of police and not upon "a" or "any" police chief. In addition, § 98 draws a parallel between "the chief of police" and "the board or officer having control of the police in a city or town" for purposes of approving the carrying of weapons by police officers. Such parallel statutory construction indicates that only the police chief who has control of the police in a given city or town may authorize officers in that city or town to carry weapons pursuant to G.L. c. 41, § 98. *See Commonwealth v. Baker*, 369 Mass. 58, 68 (1975); *Hodgerney v. Baker*, 324 Mass. 703, 706 (1949). *See also* G.L. c. 41, §§ 97, 97A (providing that the chief of police of a town shall be in "immediate control" of the police officers of that town, who shall obey his orders.) Finally the report of the Department of Public Safety which apparently led to

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[1]Section 131 of G.L. c. 140 was recently amended by St. 1986, c. 481 § 2 in respects not material to this opinion.

the amendment of § 98 in its present form recommended "that weapons carried by police officers should be approved by the heads of the police departments." Mass. H. Doc. No. 3705 at 11 (1957). *See Commonwealth v. Seay*, 376 Mass. 735, 741 (1978) (discussing significance of the Department of Public Safety Report). As the statute previously charged "the mayor or selectmen, the city or town manager" with the responsibility to authorize weapons to be carried by police officers, St. 1954, c. 162, § 1, the present wording of § 98 should be interpreted to limit the chiefs' authority to the specific police departments over which they preside. *See Murphy v. Bohn*, 377 Mass. 544, 547-48 (1979); *Ferullo's Case*, 331 Mass. 635, 637 (1954); 1A Sands, Sutherland Statutory Construction, § 22.30 at 265 (4th Ed. 1985 rev.) ("amendatory acts to not change existing law further than is expressly declared or necessarily implied").

In short, the language, structure and apparent purpose of the G.L. c. 14, § 98 indicate that chiefs of police may authorize officers under their commands to carry weapons within the Commonwealth, without regard to the officers' place of residence. Because G.L. c. 41, § 98 appears to resolve the thrust of your question concerning the authority of a police chief to allow non-resident police officers under his command to carry weapons, I decline to consider whether G.L. c. 140, S 131 gives a police chief the further authority to issue licenses to such officers to carry or possess firearms.

Very truly yours,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

January 20, 1987

L. Edward Lashman
Chairman
Board of Regents of Higher Education
One Ashburton Place
Boston, Massachusetts 02108

Dear Chairman Lashman:

The Board of Regents, acting through its general counsel and pursuant to the specific statutory authorization of St. 1985, c. 720,[1] has solicited my opinion concerning the constitutionality of a tuition system which would charge nonresident aliens holding "F-1" visas the full cost of their education, while charging residents and other nonresidents a lesser amount.

Several countervailing considerations affect the content of this response. First, your request conflicts with my usual role as Attorney General, which casts me as the defender of state laws rather than the arbiter of their constitutionality. Mass. Const., pt. I, Declaration of Rights, art. 20 and 30. Ordinarily I respond to a request such as the Board's simply by providing advice as to whether and how I would defend a law if it were subject to a particular type of constitutional challenge. Here, on the other hand, my opinion is a statutory prerequisite to the implementation of such a tuition system, if that system will result in higher charges for the F-1 visa holders than for other nonresident students.[2]

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[1] St. 1985, c. 720, §1 added a new section to the General Laws, G.L. c. 15A, §5A, which provides:

> The board of regents of higher education is hereby authorized to fix and establish, as the charges for tuition at all institutions of public higher education to aliens in this country, under the provisions of an F-1, United States nonimmigrant visa, issued by the Department of Immigration, who are nonresidents of the commonwealth, the amount of money equal to the average amount necessary to maintain a student at such an institution; provided, however, that prior to the establishment of any system of tuition charges which requires the payment of tuition by such alien students who are nonresidents of the commonwealth at a higher level than that required to be paid by other students who are nonresidents of the commonwealth, the board shall seek and obtain a written opinion of the attorney general that such system of charges does not contravene the guarantees of equal protection under the laws contained in the Constitutions of the United States and the commonwealth.

St. 1985, c. 720, §2 contains provisions limiting the application of the foregoing.

[2] Alien students who possess F-1 visas are considered by the Immigration and Nationality Act (INA), 8 U.S.C. §1101(a) (15) (F) (i), to be of "nonimmigrant" status. This status is based on the language of subsection (f) (i), which states that such students have a "residence in [another] country which [they have] no intention of abandoning," and have entered the United States for the sole purpose of attending an education institution. *Toll v. Moreno*, 458 U.S. 1, 14 n. 20 (1982)

Even more important, while the Board has solicited my opinion on the question it deems posed by the statute, that statute requires me to opine on the validity of a proposed system of charges. Your request was not accompanied by a proposed system of charges. As a consequence, I am being asked not only to depart from my normal role as defender of state laws, but to decide a question of constitutional dimension on an abstract or hypothetical set of facts. Under these circumstances it is a practical impossibility to render the opinion required by the statute. What follows, then, should be regarded simply as legal advice to aid you in structuring a tuition policy consistent with both Chapter 720 of the Acts of 1985 and the equal protection guarantees of the federal and state constitutions. It is my belief that such a policy can be formed.

The simplest way to effectuate the authorization contained in Chapter 720 without running afoul of equal protection guarantees would be to establish only a two-tier tuition system like the one currently in place.[3] Under such a system, Massachusetts residents, including aliens who meet an objective test of residency, could benefit from state tuition subsidies. Conversely nonresidents, including aliens holding F-1 visas, would be charged the full costs of their education. Such a system would vary from pre-existing Board policy only in the sense that tuition for the latter class is currently set at 95% of the instructional cost of education, not the 100% contemplated by St. 1985, c. 720.

The basic command of the equal protection clause in the federal Constitution has long been held to be: treat similarly situated persons equally. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). By the same token, however, classifying is the essence of legislating and the Constitution has never been held to require things which are different to be treated the same. *Tigner v. Texas*, 310 U.S. 141, 147 (1940). Under traditional equal protection principles, a state retains broad discretion to classify similarly situated individuals or groups and treat them differently as long as its classification bears some rational relationship to a legitimate governmental interest. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Opinion of the Justices*, 373 Mass. 883, 886 (1977).[4]

(F-1 students expressly precluded by statutory language from obtaining United States domicile).

[3] G.L. c. 15A, §5 authorizes the Board of Regents to "develop a rational and equitable statewide tuition plan for all institutions of public higher education in the commonwealth, which plan shall take into account by type of institution the per student maintenance costs, total mandated costs per student and the need to maximize student access to higher education regardless of a student's financial circumstances . . . ."

I have been provided a copy of the Board's Tuition Policy, as revised in December 1984, and have been informed it constitutes the plan contemplated by G.L. c. 15A, §5.

[4] The standard of review is the same under the fourteenth amendment to the federal Constitution as under the cognate provisions of the Massachusetts Declaration of Rights. *Commonwealth v. Franklin Fruit Co.*, 388 Mass. 228, 235 (1983). Because the body of case law construing the federal law is much greater, the discussion in this opinion principally involves federal precedent. My conclusion, however, is that both federal and state constitutional provisions are implicated by Chapter 720, but that each can be satisfied by an appropriate system of charges.

The pre-existing tuition policy of the Board attempts to apportion the cost of a student's education according to a calculation of the distribution of benefits between the student and the Commonwealth. The theory is that the Commonwealth benefits from the education of its population, even as individual graduates are enriched by their educational experience. The present policy concedes that no mathematically precise allocation of benefits is possible but asserts there is a national model which it expressly adopts. That model is "[t]he Carnegie Commission on Higher Education's assignment of a maximum of one third of the benefits and costs of public undergraduate education to the student, and two thirds to the state."

The policy then proceeds from the basic recognition that in-state and out-of-state students are not the same. The rationale for charging out-of-state students a higher rate than their in-state counterparts is obvious; the Commonwealth does not benefit as directly from the education of the former group as it does from the latter. Precisely such a rationale has consistently been deemed sufficient to support differences in tuition charges where alienage is not in issue. *See, e.g., Clarke v. Redeker*, 406 F.2d 883, 885 (8th Cir. 1969), *cert. denied*, 396 U.S. 862; *Hooban v. Boling*, 503 F.2d 648, 650 (6th Cir. 1974), *cert. denied*, 421 U.S. 920 (1975); *Johnson v. Redeker*, 406 F.2d 878, 883 (8th Cir. 1969), *cert. denied*, 396 U.S. 853. Uniformly, courts have examined the higher charges paid by non-state resident American students under the rational basis test and concluded that the higher tuition charges bear a rational relation to a state's goal of requiring non-state residents to share in the fiscal burden placed upon state residents. *See* Lines, *Tuition Discrimination: Valid and Invalid Uses of Tuition Differentials*, 9 Journal of College and University Law 243 (1982-83).

A much more difficult question is posed,[5] if the Board attempts to adopt a three-tier policy, singling out F-1 visa holders and charging only them the full costs of their education. This is so because such a classification could be viewed as a distinction based on alienage, making it inherently suspect and subject to a heightened degree of judicial scrutiny. *Bernal v. Fainter*, 467 U.S. 216, 219-222 (1984); *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971). Aliens as a class are a prime example of a "discrete and insular" minority, *id.* at 372, for whom such heightened judicial solicitude has historically been applied. Thus, "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Takahasi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948).

It would be possible, of course, to defend such a system by arguing that it does indeed satisfy a strict scrutiny test. I would be prepared to argue that the unique status of F-1 students warrants their disparate treatment. I would assert that the Commonwealth's purpose is permissible and substantial and the classification drawn is necessary to the accomplishment of this purpose. *See In re Griffiths*, 413 U.S. 717, 721-22 (1973); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). Because few statutes survive strict scrutiny, however, I would also argue that our system does not discriminate on the basis of alienage *per se*. Under such a system, not all aliens attending state colleges and universities would be charged the highest

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[5] The question is presumably the very one not reached in *Elkins v. Moreno*, 435 U.S. 647, 663 (1977), and *Toll v. Moreno*, 458 U.S. at 10 (1981); whether a state policy which excludes from educational subsidies a group of aliens who cannot become residents because of the operation of federal law is consistent with the equal protection clause of the fourteenth amendment. The issue was not reached in those cases in part because the plaintiffs held G-4 visas and were therefore not precluded from becoming residents.

tuition. Instead only those with F-1 status, i.e., those who are in this country solely to attend school and who are precluded under federal law from remaining in Massachusetts after graduation, would be subject to full tuition. Some aliens, for example, children of diplomats or resident aliens, would be charged the same tuition as Massachusetts residents while still others would pay rates commensurate with other American students. Thus, the system would arguably discriminate *among* aliens, not *between* alien and citizen. The United States Supreme Court recognized the significance of this distinction in *Mathews v. Diaz*, 426 U.S. 67 (1976), noting that "the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country." *Id.* at 78-79. In both *Mathews* and in the present situation "[t]he real question presented . . . is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination *within* the class of aliens . . . is permissible." Undercutting such an argument would be the fact the Supreme Court has rejected similar contentions in the context of education benefits in *Nyquist v. Mauclet*, 432 U.S. at 8, 9. The fact that the New York statute in issue in *Nyquist* was directed at and affected only aliens made it in the eyes of the Court in that particular instance a classification based on alienage.

What sets F-1 visa holders apart from the other aliens considered in *Nyquist* and *Toll* is that they are not and cannot become residents. For equal protection analysis purposes, this distinction may justify their disparate treatment.[6] The fact remains, however, that a tuition system charging F-1 visa holders more money than residents is most likely to survive constitutional challenge only if it treats others similarly situated to them equally. In other words, in devising your system you should not attempt to single out F-1's, and instead should impose full tuition costs on any other students who share with them the critical traits that they are not and cannot become future Massachusetts residents, or have indicated through some affirmative act a

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[6] It is possible, of course, that the courts would not apply a strict scrutiny test to a tuition system focused exclusively on F-1 non-immigrant alien students. Some observers suggest that alienage now enjoys only quasi-suspect status, generating an intermediate level of scrutiny. *Harris v. McRae*, 448 U.S. 297, 342, n. 3 (1980) (Marshall, J., dissenting). Others suggest that non-immigrant aliens (F-1's) are not a suspect class. *Toll v. Moreno*, 458 U.S. 1, at 44 (Rehnquist, J., dissenting).

The Supreme Court has departed from strict scrutiny analysis and applied a rational basis test in cases where permanent resident aliens or other non-citizens have sought employment in areas involving a governmental or police function. *See, e.g., Foley v. Connelie*, 435 U.S. 291, 297-300 (1978) (New York statute limiting appointment to state police to citizens, excluding permanent resident aliens, did not violate equal protection); *Ambach v. Norwick*, 441 U.S. 68, 80-81 (1979) (New York statute forbidding permanent certification as public school teacher of any person not U.S. citizen unless person has manifested intent to become U.S. citizen did not violate equal protection); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (California statute excluding permanent resident aliens from employment as deputy probation officers was not in violation of equal protection). The Massachusetts Supreme Judicial Court has invoked the governmental function exception to the strict scrutiny of alien classifications in holding that the Massachusetts statutory requirement that a jury be composed wholly of United States citizens does not violate equal protection. *Commonwealth v. Acen*, 396 Mass. 472, 481 (1986). In any event, a rational relationship between means and ends is required even under these intermediate levels of scrutiny.

future intention not to reside in this state. You best serve the statutory and constitutional provisions in issue here by tailoring your future tuition policy carefully so that the means you have chosen, *i.e.*, charging differential tuition rates to different categories of students, fits precisely the legitimate government ends served by that policy, *i.e.*, allocating education costs between the Commonwealth and individual students in accordance with the benefits each receive. It is at least worth noting in passing that the increment between the 95% level currently charged non-resident students and the 100% level contemplated by Chapter 720 for F-1 students is minimal and may precisely reflect the differences in their status as potential residents.

It is also worth noting that the Massachusetts General Court does not stand alone in its determination that subsidizing the education of non-immigrant aliens is unwise social policy. In the closing days of its most recent session, Congress passed the Higher Education Amendments of 1986, Pub. L. No. 99-498, one section of which limits eligibility for federal financial educational assistance to a person who is "a citizen or national of the United States, a permanent resident of the United States, in the United States for other than a temporary purpose and able to provide evidence from the Immigration and Naturalization Service of his or her intent to become a permanent resident . . . ." Pub. L. No. 99-498, §407, 100 Stat. 1480. By definition, the F-1 students identified in Chapter 720 can produce no such evidence and hence are ineligible for federal financial assistance. While not dispositive of the constitutional questions you have posed, this law, particularly when read in conjunction with the nearly contemporaneous provisions of the federal Immigration Reform and Control Act of 1986, Pub. L. 99-603, negates the Supremacy Clause arguments on which *Toll v. Moreno*, 458 U.S. 1, actually turned.

In sum, I advise you that St. 1985, c. 720 can be implemented in a manner consistent with the guarantees of equal protection contained in the federal and state Constitutions. The development of an actual tuition policy is committed to the discretion of the Board, which should be guided by the principles and arguments set forth in this opinion. In the absence of an actual proposed set of charges, I must respectfully decline to place my imprimatur on any particular set of tuition charges.

Very truly yours,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

June 5, 1987

Michael J. Connolly
Secretary of State
State House
Boston, Massachusetts 02133

Dear Secretary Connolly:

You have asked my opinion regarding the propriety of two referendum petitions concerning chapter 71 of the Acts of 1987 (''chapter 71'') entitled ''An Act Further Regulating Legislative and Constitutional Officers' Compensation'', and enacted as an emergency law.[1] The first petition requests the repeal of chapter 71. The second petition seeks to repeal and suspend the operation of this law.

The first question you have asked is whether chapter 71 may be the subject of a referendum petition under the Massachusetts Constitution. Your second question is whether you should proceed to provide blank forms for the use of subsequent signers of the second petition. In order to answer this question, I must make a determination whether the second petition is properly within the scope of the referendum petition process under the Massachusetts Constitution. Finally, you have requested, contingent upon my opinion that chapter 71 properly may be the subject of a referendum petition, that I prepare a fair, concise summary of the law pursuant to Amendments, Article 48, General Provisions, Pt. III.

For the reasons more fully set forth below, it is my opinion that (1) chapter 71 may be the subject of a referendum petition under Article 48 of the Amendments to the Massachusetts Constitution and (2) the second petition is not properly within the scope of the referendum process because the Massachusetts Constitution does not permit the suspension of an emergency law by means of a referendum petition.

To answer your first question concerning the propriety of chapter 71 as the subject of a referendum petition, it is necessary to determine whether the Act relates to any matter excluded from the referendum process. If chapter 71 relates to an excluded matter, it may not be the subject of such petition. See Amendments, Article 48, The Referendum, Pt. III, §§1, 2. See also 1982/83 Op. Att'y Gen. No. 4, Rep. A.G., Pub. Doc. No. 12 at 88 (1982). Laws that are expressly excluded from the referendum process are those that relate to:

> religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriate[ ] money for the current or ordinary expenses

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[1] Chapter 71 provides a compensation schedule for the members of the legislature and certain constitutional officers of the Commonwealth. It was enacted by the legislature as an emergency law, and became effective immediately upon being signed by the Governor on May 22, 1987. You have informed me that the two petitions referred to in your opinion request were filed with your office on June 1, 1987 and signed by ten qualified voters of the Commonwealth.

> of the commonwealth or for any of its departments, boards, commissions or institutions . . . Amendments, Article 48, The Referendum, Pt. III, §2.

It is clear from a review of chapter 71 that this law does not relate to any such excluded matters.[2] Consequently, chapter 71 may be the subject of a referendum petition. Because the first petition is within the scope of Amendments, Article 48, The Referendum, Pt. III, §4, I am providing to you a summary of chapter 71 pursuant to my obligation under Amendments, Article 48, General Provisions, Pt. III.

With respect to the propriety of the second petition, a further analysis is required because in addition to calling for the repeal of chapter 71, this petition requests the immediate suspension of the Act. The law on this issue is well-settled and does not require extended discussion. The mode of requesting the suspension and referendum of a law is set out in Section 3 of Amended Article 48, The Referendum, Pt. III. That section does not specifically provide for the suspension by petition of an emergency law. "It is manifest and apparent that the silence of Section 3 of Amended Article 48 relative to suspension of emergency laws carries considerable significance . . . . Where the intention is clear, there is no room for constitutional construction

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[2] An appropriation of money is an excluded matter under Amendments, Article 48, The Referendum, Pt. III, §2. However, it is well settled that a provision, such as chapter 71, which fixes salaries for members of the legislature and certain other public officers, is not an appropriation. See *Murray v. Secretary of the Commonwealth*, 345 Mass. 23 (1962); *Opinion of the Justices*, 323 Mass. 764, 766-767 (1948); *Opinion of the Justices*, 309 Mass. 571, 587 (1941).

SUMMARY
CHAPTER 71 OF THE ACTS OF 1987

The law provides a salary increase, effective January 7, 1987, for the members of the legislature and certain constitutional officers of the Commonwealth.

Beginning at a base salary of $30,000, each member of the legislature will receive a salary increase under the law equal to the compounded percentage increase in the salaries of full time state employees who are subject to collective bargaining agreements between the Commonwealth and the ALLIANCE, AFSCME-SEIU, AFL-CIO in effect between January 5, 1983 and January 7, 1987. Thereafter the salaries of each member of the legislature will be increased by the same percentages as the salaries of full time state employees subject to the collective bargaining agreements.

The law further provides that members of the legislature holding leadership positions and committee chairmanships will receive an annual sum in addition to their salary. This additional amount will vary from $7,500 to $35,000 depending upon the particular position the member holds.

The law also increases the salaries of certain constitutional officers. Under the law the salary of the governor is set at $85,000; the salaries of the lieutenant governor, state secretary, state treasurer and the state auditor are set at $70,000; and the salary of the attorney general is set at $75,000.

Any individual may waive his or her salary increase under this law. Any amount so waived shall not be deemed regular compensation for the purposes of computing any such person's benefits and shall be exempt from state taxation.

and no excuse for interpolation or addition." 1963/64 Op. Att'y Gen., Rep. A.G., Pub. Doc. No. 12 at 57 (1963). The Supreme Judicial Court has clearly held and subsequently reaffirmed that the Massachusetts Constitution does not permit the operation of an emergency law to be suspended by means of a referendum petition. See *Molesworth v. Secretary of the Commonwealth*, 347 Mass. 47, 48 (1964). See also *Opinion of the Justices*, 368 Mass. 889, 892-93 (1975); *Opinion of the Justices*, 286 Mass. 611, 623 (1934).

Petitioners are not entitled to blank forms for collecting signatures on petitions calling for the suspension of an emergency law. See *Molesworth* at 49. Because the second petition relates to the suspension of an emergency law, it is not within the scope of the referendum petition process. Therefore, you should not proceed to provide blank forms for the use of subsequent signers.

Very truly yours,
JAMES M. SHANNON
ATTORNEY GENERAL

June 29, 1987

Joellen M. D'Esti, Esq.
Executive Office of Economic Affairs
One Ashburton Place, Room 2101
Boston, Massachusetts 02108

Dear Ms. D'Esti:

You have requested my opinion whether the Massachusetts Industrial Advisory Board (the "MIAB") has the authority to review partial plant closing determinations made by the Director of the Division of Employment Security (the "Director"), pursuant to G.L. c. 151A, §§ 71A-C. You have further inquired as to the steps that would be required to enable the MIAB to review such determinations if the MIAB is currently without authority to take such action. You have made these requests on behalf of the MIAB and the Executive Director of the Massachusetts Industrial Services Program.

For the reasons set forth below, it is my opinion that the MIAB does not have authority under current statutory law to review the decision of the Director on a partial plant closing. As to your second question, a review of the applicable statutes makes evident that legislative action would be necessary in order to vest the MIAB with such authority. It would not be appropriate, however, to address in this opinion the specific statutory changes that would be required to accomplish this, because such a legal analysis does not concern the "official duties" of the MIAB or the Industrial Services Program. *See* G.L. c. 12, § 3.

The role of the MIAB, set forth in G.L. c. 6, § 190, is essentially advisory in nature:

> "The [MIAB] shall advise the governor . . . on issues and policy matters pertaining to the well-being of industry in the commonwealth, including . . . overseeing the development of the Massachusetts industrial service program, . . . making recommendations to improve the performance of said program, monitoring the implementation of the social compact governing private and public actions to cushion the impact of plant closings, and providing advice on industry-wide assistance programs...." G.L. c. 6, § 190.[1]

See also G.L. c. 151A, § 71A (defining the MIAB as established "for the purpose of advising certain officials of the commonwealth on the implementation of certain provisions . . . and on possible future policies"). With respect to plant closings in particular, this advisory role of the MIAB is clear: the MIAB "shall advise the [D]irector . . . in analysis of plant closings in accordance with [G.L. c. 151A, § 71C]." G.L. c. 6, §190. There is no language in the MIAB's enabling legislation demonstrative of any authority vested in the MIAB to review determinations of "covered partial closings" made by the Director.

This conclusion draws further support from the statutory scheme governing plant closing determinations. In particular, chapter 151A provides that determinations of covered partial plant closings are to be made by the Director, pursuant to regulations promulgated by the Director and subject to a specific hearing and appeal

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[1]The MIAB also has a responsibility on behalf of small employers [illegible] G.L. c. 6, § 190.

procedure involving the Director and the Board of Review.[2] Pursuant to G.L. c. 151A, § 71C, "the [D]irector shall, in consultation with the [MIAB], identify and assess various categories of partial [plant] closings. Subsequently, the [D]irector shall, by regulation, identify those partial closings that are deemed to fall within the intent of [G.L. c. 151A, §§ 71A-G]."[3] Thus, although the Director must consult with the MIAB in identifying and evaluating various categories of partial closings, it is the Director alone who has the authority to promulgate regulations that "identify those partial closings" to be covered by G.L. c. 151A, §§ 71A-G. *See* G.L. c. 151A § 71C.

Similarly, with respect to partial closings made subject to the provisions of G.L. c. 151A, §§ 71B-G, it is the Director, not the MIAB, who certifies whether a "plant closing" has occurred or will occur. *See* G.L. c. 151A, § 71B(a). *See also* G.L. c. 151A, § 71A ("date of certification" defined as actual or anticipated date of "plant closing" or "covered partial closing *as determined by the [D]irector*") (emphasis added).

Moreover, the procedure expressly provided for reviewing the Director's determination on a plant closing or a "covered partial closing" does not establish any role for the MIAB. This statutory procedure requires that a hearing be conducted and a decision rendered by either a hearing officer designated by the Director, or by the Board of Review, pursuant to G.L. c. 151A, § 41(d). *See* G.L. c. 151A, § 71B(b).[4] Specifically, § 71B(b) provides that "[a]ny interested party notified

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[2] The Board of Review is established within the Division of Employment Security pursuant to G.L. c. 23, § 9N(b). *See* G.L. c. 151A, § 1(d).

[3] Employees who are terminated in "covered partial closings established by said regulations" may be eligible for the reemployment assistance benefits and health insurance benefits to which employees terminated as a result of a plant closing are entitled. *See* G.L. c. 151A, § 71C. *See also* G.L. c. 151A, §§ 71A, F, G.

[4] Although facially G.L. c. 151A, § 71B refers only to "plant closings", it is clear from an examination of other relevant sections of this statute that these review procedures also apply to covered partial closings. For example, G.L. c. 151A, § 71C provides that the Director must identify by regulation "those partial closings that are deemed to fall within the intent of [G.L. c. 151A, §§ 71A-G], inclusive." In addition, a "covered partial closing" is defined as a "partial closing" which the Director has determined pursuant to § 71C "to be covered by the provisions of [§§ 71B-G], inclusive." *See* G.L. c. 151A, § 71A. Thus, covered partial closings are incorporated by reference in G.L. c. 151A, § 71B and therefore the §71B procedures for certifying a plant closing and for reviewing a decision of the Director on a plant closing are applicable to a covered partial closing.

of a determination'' by the Director on a plant closing ''may request a hearing....'' The hearing is to be conducted by a hearing officer designated by the Director, except that matters involving a plant closing resulting from a labor dispute may be referred by the Director to the Board of Review for hearing and decision, pursuant to G.L. c. 151A, § 41(d). *See* G.L. c. 151A, § 71B(b).[5] In addition, § 71B(b) further requires that an appeal from any decision on certification of a plant closing, made after a hearing, shall be in the first instance to the Board of Review, pursuant to G.L. c. 151A, §§ 40-41.

Given the express and limited advisory role concerning partial plant closings delegated to the MIAB in G.L. c. 6, § 190, as well as the specific procedures established in G.L. c. 151A, § 71B for the review of partial closing determinations, I conclude that the MIAB does not currently have the authority to review covered partial plant closing determinations made by the Director.

Because I have concluded that the MIAB does not have the authority to review plant closing determinations, your request for my opinion on the steps to be taken to vest the MIAB with such authority does not concern a matter relating to the ''official duties'' of the MIAB or the Industrial Services Program. It is apparent, given the prevailing statutory law, that legislative action would be necessary in order to vest the MIAB with such authority. Since more detailed legal advice in this regard would effectively involve drafting a legislative proposal, this is not an appropriate matter on which to render a formal opinion.

Very truly yours,
JAMES M. SHANNON
ATTORNEY GENERAL

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[5] The Board of Review is authorized to review decisions of the Director concerning unemployment benefits claims made under G.L. c. 151A, § 39. *See* G.L. c. 151A, § 40. On request of the Director, the Board, as opposed to a hearing officer, is required to hold a hearing in the first instance when the benefits claim involves a work stoppage resulting from a labor dispute at the place of employment. *See* G.L. c. 151A, §§ 25(b), 39(b), (d).

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